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PUTTING ETHICS AND TRADITIONAL LEGAL PRINCIPLES BACK INTO CALIFORNIA TORT LAW: BARRING WRONGFUL-BIRTH LIABILITY IN PREIMPLANTATION GENETIC TESTING CASES

*Christina L. Goebelsmann**

Preimplantation genetic testing (PGT) is a process that is used to screen healthy embryos prior to implantation during the in vitro fertilization process. The inherent limitations of PGT have the potential to expose doctors to wrongful-birth liability, which typically arises in other contexts where inaccurate or insufficient genetic testing and counseling deprive the parents of the opportunity to abort an impaired child. However, basic principles in contemporary ethics and traditional tort law illustrate why it is inappropriate to expand wrongful-birth liability to situations involving PGT, and why alternative tort schemes, such as the informed consent doctrine, may better address problems stemming from the use of PGT.

I. INTRODUCTION

Preimplantation genetic testing,¹ a process used to screen for healthy embryos prior to implantation during the in vitro fertilization process, is poised to open “a Pandora’s box of legal ills.”² The test has the potential to place doctors at risk for liability under the tort of wrongful birth,³ which compensates parents for the birth of a disabled infant because inaccurate or insufficient genetic testing and

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1. This type of testing is also referred to as “preimplantation genetic diagnosis.”

2. Alexander Morgan Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 619 (1979).

3. *Id.* at 634 n.62.

counseling deprived the parents of the opportunity to abort the impaired child.⁴

This Note specifically addresses the propriety of applying wrongful-birth liability when preimplantation genetic testing fails to prevent a disability in an infant conceived via in vitro fertilization.⁵ It argues against the expansion of wrongful-birth liability based upon historic tort principles and contemporary ethics, and suggests that other legal theories provide better remedies. To this end, Part II outlines the development of the wrongful-birth cause of action in tort, while Part III explains preimplantation genetic testing and how its inherent errors provide a basis for wrongful-birth claims. Next, Part IV discusses ethical concerns arising from applying wrongful-birth liability to preimplantation genetic testing scenarios. Part V takes a critical look at the wrongful-birth action from traditional tort perspectives. Then, Part VI shows how shortcomings in the wrongful-birth tort compel rejecting it in favor of other legal theories, such as the doctrine of informed consent.

II. THE GENESIS OF WRONGFUL-BIRTH LIABILITY

The term “wrongful birth” is loaded. It conjures up images of unwanted babies, unwilling parents, and grave medical misdiagnoses. As a cause of action in tort, it implies that negligent medical treatment resulted in the birth of an impaired child. Yet, this tort has nothing to do with a doctor *causing a child* to become handicapped.⁶ Rather, it is about a doctor *depriving the parents* of the opportunity to make an “informed and meaningful decision” to abort a so-called defective child.⁷ Although most jurisdictions now provide for some recovery under this tort, this was not always the case.⁸

4. *See id.*

5. This Note focuses on California tort law, although law from other jurisdictions is used to further illustrate some points. The discussion presents arguments against applying wrongful-birth liability where the alleged injury is the result of either poor doctor-patient communication or medical misdiagnosis. *See infra* Parts IV, V.

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

7. *See id.* at 1025 n.2 (listing notable cases); *Turpin v. Sortini*, 643 P.2d 954, 962 (Cal. 1982); *Azzolino v. Dingfelder*, 337 S.E.2d 528, 531 (N.C. 1985). This cause of action is not to be confused with a wrongful-life action, which permits an impaired child to recover in tort for negligent medical treatment that led to the child's birth. *Azzolino*, 337 S.E.2d at 531.

8. *See Turpin*, 643 P.2d at 960 (citing CAL. CIV. CODE § 29 (repealed 1993) and *Scott v. McPheeters*, 92 P.2d 678 (Cal. Ct. App. 1939), *superseded by statute*, CAL. CIV. CODE § 29, *as*

A. Judicial Reluctance to Recognize Wrongful-Birth Claims

When wrongful-birth claims were first considered, courts rejected them.⁹ At the time, there was strong societal disdain of abortion, which was illegal in most jurisdictions,¹⁰ and courts were considered responsible for protecting lives.¹¹ It was believed that the law should prevent “the destruction of the peace and unity of family life and . . . the impairment of parental authority and discipline.”¹² Accordingly, judges considered “the birth of a child [to be] a benefit to its parents as a matter of law,” and undertook to “enforce the traditional view of parental responsibility.”¹³ Additional concerns about judicial economy and the feasibility of assessing damages for negligently inflicted prenatal harm prevented courts from recognizing the tort for many years.¹⁴ Then came *Roe v. Wade*.¹⁵

B. *Roe v. Wade* and Reverberations of Change

When the U.S. Supreme Court handed down its decision in *Roe v. Wade*, it unknowingly instigated a state court movement of recognizing wrongful-birth actions. The influential opinion in *Roe* established a woman’s right to terminate her pregnancy.¹⁶ While the right was not intended to be absolute,¹⁷ a strong presumption in favor of patient autonomy in all reproductive settings gained traction in the law. A decade after the *Roe* opinion was issued, legal treatises began commenting on “the rapid development of tort claims” surrounding the “birth of an unwanted child.”¹⁸

recognized in *Myers v. Stevenson*, 270 P.2d 885 (Cal. Ct. App. 1954); *Haymon v. Wilkerson*, 535 A.2d 880, 883 (D.C. 1987). At least nineteen states have recognized the cause of action. *Keel*, 624 So. 2d at 1025 n.2.

9. See *Turpin*, 643 P.2d at 960.

10. Elizabeth F. Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a New Framework*, 22 J. FAM. L. 677, 691 (1983–1984).

11. *Id.*

12. *Luster v. Luster*, 13 N.E.2d 438, 439 (Mass. 1938).

13. Collins, *supra* note 10, at 696.

14. See *id.* at 679.

15. 410 U.S. 113 (1973).

16. *Id.* at 154.

17. ELLEN ALDERMAN & CAROLINE KENNEDY, *THE RIGHT TO PRIVACY* 59 (1995); see also *id.* at 64 (indicating that under the undue burden standard, “[o]nly if a law places a ‘substantial obstacle’ in the path of a woman seeking an abortion before viability will it be struck down”).

18. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 55, at 370 (5th ed. 1984).

Roe had heralded in a new era. One court stated, “The Supreme Court has established the constitutional right of parents to decide whether to prevent the conception or birth of a [handicapped] child.”¹⁹ Since couples were now seen as imbued with a new right—the ability “either to accept or reject a parental relationship”²⁰—public policy arguments began favoring wrongful-birth liability. The old principles of protecting life and ensuring parental accountability²¹ were cast aside as “no longer valid.”²² Focus shifted away from concerns over the child’s welfare to concerns about the impairment of an individual’s constitutional right.²³

Consequently, the former policy of ensuring parental responsibility was turned on its head. Commentators began to argue that the birth of unexpectedly impaired children resulted in “mental, emotional and moral suffering” and “diminished parental capacity,”²⁴ and that the refusal to recognize wrongful-birth actions would result in the protection of tortfeasor doctors at the expense of both fundamental rights and children’s health.²⁵ One court opined that “[i]t would be unreasonable to compel parents to bear the expense of medical treatment required by a child and to allow the wrongdoer to go scot-free.”²⁶ These concerns began to outweigh past fears over judicial economy to the point where it was accepted that “fraud or collusion in one class of cases” would not be allowed to foreclose recovery in “all cases of that class.”²⁷

As a result of this substantial shift in judicial perspective, many jurisdictions now recognize wrongful-birth actions on the basis that

19. *Haymon v. Wilkerson*, 535 A.2d 880, 882 (D.C. 1987) (upholding a wrongful-birth claim where a doctor’s failure to heed a patient’s concerns about not having an amniocentesis resulted in the birth of a child with Down syndrome).

20. *Schroeder v. Perkel*, 432 A.2d 834, 840 (N.J. 1981).

21. *See supra* Part II.A.

22. *Keel v. Banach*, 624 So. 2d 1022, 1024 (Ala. 1993) (citing Lori B. Andrews, *Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks*, 29 HOUS. L. REV. 149, 152–55 (1992)); *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 695 (E.D. Pa. 1978).

23. *See, e.g., Viccaro v. Milunsky*, 551 N.E.2d 8, 9–10 n.3 (Mass. 1990).

24. *Schroeder*, 432 A.2d at 845 (Handler, J., concurring & dissenting).

25. *See Keel*, 624 So. 2d at 1026 (citing *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981)).

26. *Schroeder*, 432 A.2d at 839.

27. *Dillon v. Legg*, 441 P.2d 912, 918 (Cal. 1968) (citing *Emery v. Emery*, 289 P.2d 218, 224 (Cal. 1955) in the context of emotional distress).

“individuals have a right to control their reproduction and the form of the child to whom they give birth.”²⁸ California is one of these jurisdictions.²⁹

C. The Current State of Wrongful-Birth Liability

The turn of the judicial tide to favoring wrongful-birth liability in California occurred in 1982, when the California Court of Appeal permitted a mother to recover medical expenses for the birth of a child following an ineffective sterilization procedure even though the child was born healthy and the mother had refused an abortion.³⁰ Later, the court confirmed the establishment of this new tort, stating that it was carrying out “a public policy [in favor] of maximizing patients’ individual autonomy, reproductive choice, and rights of informed consent.”³¹ It has since applied the tort to situations involving unhealthy infants. In doing the same, the California Supreme Court noted that “the overwhelming majority of decisions in other jurisdictions recognize the right of the parents to maintain [a wrongful-birth] action” for the birth of an impaired child.³²

However, recovery is not permitted in all cases. For instance, in 1989, the California Court of Appeal denied recovery to a mother who gave birth to a child with Down syndrome after her doctor failed to perform preventive prenatal testing.³³ Highlighting the importance of following traditional tort principles regarding causation, the court stated there was an insufficient causal connection between the child’s condition and the doctor’s failure to perform the preventive prenatal testing “to expand the circle of liability”³⁴ to include the doctor. The

28. Collins, *supra* note 10, at 700.

29. See Turpin v. Sortini, 643 P.2d 954, 960 (Cal. 1982) (citing CAL. CIV. CODE § 29 (repealed 1993) and Scott v. McPheeters, 92 P.2d 678 (Cal. Ct. App. 1939), *superseded by statute*, CAL. CIV. CODE § 29, *as recognized in* Myers v. Stevenson, 270 P.2d 885 (Cal. Ct. App. 1954)); *see also* Morris v. Frudenberg, 185 Cal. Rptr. 76, 80–81 (Ct. App. 1982).

30. Morris, 185 Cal. Rptr. at 78.

31. Foy v. Greenblatt, 190 Cal. Rptr. 84, 91 (Ct. App. 1983). To this end, the California Legislature enacted section 43.6 of the California Civil Code to bar any defense to a wrongful-birth action based upon the “failure or refusal of a parent to prevent the live birth of his or her child.” CAL. CIV. CODE § 43.6 (1982).

32. Turpin, 643 P.2d at 955 (emphasis omitted).

33. Simmons v. W. Covina Med. Clinic, 260 Cal. Rptr. 772, 773 (Ct. App. 1989).

34. *Id.* at 778.

court also raised concerns regarding the potential harm the tort would cause to doctor-patient relationships.³⁵

Echoing the past,³⁶ similar concerns have been raised in other jurisdictions that have refused to grant recovery.³⁷ For example, the North Carolina Supreme Court rejected the tort, stating that the wrongful-birth action fell outside the traditional tort analysis.³⁸ However, the court took one step further, specifically stating that it refused to give legal weight to the idea that “life, even life with severe defects, may ever amount to a legal injury.”³⁹

III. THE ADVENT OF PREIMPLANTATION GENETIC TESTING

Not all pregnancies are unwanted. In fact, as a result of infertility, some couples struggle to become pregnant. These individuals are unable to experience “the miracle of childbirth and the joy of parenthood” without medical intervention.⁴⁰ Unfortunately, even with the “explosion of technology” in reproductive medicine,⁴¹ nearly 50 percent of couples seeking fertility treatment will be unsuccessful.⁴² The failure of fertility treatments, such as in vitro fertilization (IVF), can be difficult for couples because the resulting disappointment occurs in a high-stress, financially draining situation,⁴³ within a society where perseverance is expected to lead to success.⁴⁴

35. *Id.*

36. *See supra* Part II.A.

37. *Azzolino v. Dingfelder*, 337 S.E.2d 528, 530 (N.C. 1985).

38. *Id.*

39. *Id.* at 534–35.

40. Anita M. Hodgson, *The Warranty of Sperm: A Modest Proposal to Increase the Accountability of Sperm Banks and Physicians in the Performance of Artificial Insemination Procedures*, 26 IND. L. REV. 357, 357 (1993). Nearly 10 to 20 percent of all couples of reproductive age will struggle with infertility. *Id.*

41. ABIM Foundation et al., *Medical Professionalism in the New Millennium: A Physician Charter*, ANNALS OF INTERNAL MED., Feb. 5, 2002, at 243, 244; *see also* Alpha: Scientists in Reproductive Medicine, Welcome to Alpha, <http://www.alphascientists.org/> (last visited Feb. 26, 2010) (“[R]ecently there has been a dramatic explosion in biotechnology and molecular biology which now dominate [the practice of reproductive medicine].”).

42. U.S. CONG. OFFICE OF TECHNICAL ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES 9 (Wash., D.C., U.S. Gov’t Printing Office 1988) [hereinafter INFERTILITY: MEDICAL AND SOCIAL CHOICES].

43. *Id.* at 118.

44. *Id.* at 131.

Consequently, the American Society for Reproductive Medicine⁴⁵ has issued guidelines “recommend[ing] the use of ‘state-of-the-art tests’ to screen for genetic disorders”⁴⁶ to improve fertility success rates. Preimplantation genetic testing (PGT), which accompanies IVF treatment, is one such technology.

A. *The IVF Process and PGT*

Infertile couples⁴⁷ typically seek reproductive assistance from medical therapies such as IVF.⁴⁸ In the IVF process, the woman takes medicine to stimulate her ovaries and then has her eggs extracted for insemination.⁴⁹ Her eggs are fertilized in a petri dish and then returned to her uterus in the hope that pregnancy will result.⁵⁰

However, IVF treatment is both expensive and risky. Each testing cycle costs between \$6,000 and \$12,000,⁵¹ with most couples ending treatment after two unsuccessful cycles for financial reasons.⁵² Those who continue IVF after unsuccessful cycles risk ovarian damage, miscarriage, early delivery, and the birth of multiples.⁵³

Genetic tests, of which there are over one thousand including PGT,⁵⁴ show great promise in addressing these concerns and

45. Am. Soc’y for Reprod. Med., About Us: Vision of ASRM, <http://www.asrm.org/detail.aspx?id=35> (last visited Feb. 26, 2010).

46. Karen M. Ginsberg, *FDA Approved? A Critique of the Artificial Insemination Industry in the United States*, 30 U. MICH. J.L. REFORM 823, 835 (1997). These genetic disorders often prompt otherwise fertile couples to undergo fertility treatment. *Id.* at 823; *see also* NAT’L INSTS. OF HEALTH DEP’T OF ENERGY WORKING GROUP ON ETHICAL, LEGAL AND SOC. IMPLICATIONS OF HUMAN GENOME RESEARCH, PROMOTING SAFE AND EFFECTIVE GENETIC TESTING IN THE UNITED STATES: FINAL REPORT OF THE TASK FORCE ON GENETIC TESTING, ch. 5 (Neil A. Holtzman & Michael S. Watson eds., 1997), available at <http://www.genome.gov/10001733> [hereinafter TASK FORCE].

47. “Infertile couples” are defined as those couples that cannot conceive after twelve months of unprotected intercourse. INFERTILITY: MEDICAL AND SOCIAL CHOICES, *supra* note 42, at 35.

48. *See id.* at 54.

49. ALDERMAN & KENNEDY, *supra* note 17, at 72.

50. *Id.*

51. Esther Landhuis, *Pre-Implantation Genetic Diagnosis Offers Hope but Prompts Ethical Concerns*, STAN. REP., Mar. 3, 2004, <http://news-service.stanford.edu/news/2004/march3/invitro-33.html>.

52. INFERTILITY: MEDICAL AND SOCIAL CHOICES, *supra* note 42, at 10.

53. *Id.* at 130–31.

54. GENETICS AND PUB. POLICY CTR., PREIMPLANTATION GENETIC DIAGNOSIS: A DISCUSSION OF CHALLENGES, CONCERNS, AND PRELIMINARY POLICY OPTIONS RELATED TO

increasing the effectiveness of IVF. These tests involve analyzing DNA, chromosomes, and related molecular structures to detect “heritable disease-related genotypes, mutations, phenotypes, or karyotypes” for the purpose of identifying and preventing diseases.⁵⁵ The vast majority of this testing occurs in embryonic, neonatal, and prenatal settings and is focused solely on diagnosing diseases.⁵⁶

In 1990, PGT was introduced as an effective treatment option.⁵⁷ Aimed at sparing parents the “difficult and often traumatic decision” of terminating a pregnancy in light of prenatal disease diagnosis,⁵⁸ the test screens three-day-old embryos for genetic disorders prior to IVF implantation.⁵⁹ Selecting the “healthiest” embryos for implantation is believed to increase the probability of a healthy baby while decreasing the likelihood of a problematic pregnancy.⁶⁰ The test can also prevent the transmission of genetic abnormalities in cases where one or both parents are carriers for a disease.⁶¹

However, each test costs between \$2,500 and \$4,000 in addition to the base fee for IVF treatment,⁶² and success is not guaranteed. Although PGT is intended to increase the effectiveness of IVF treatment, IVF pregnancy rates actually decrease with its use because fewer embryos are implanted during each cycle and those implanted may still ultimately fail to develop.⁶³

THE GENETIC TESTING OF HUMAN EMBRYOS 1 (2004), available at <http://www.dnapolicy.org/images/reportpdfs/PGDDiscussionChallengesConcerns.pdf>.

55. TASK FORCE, *supra* note 46, ch. 1 (emphasis omitted).

56. *Id.*

57. Center for Genetics and Society, About Genetic Selection, <http://www.geneticsandsociety.org/article.php?list=type&type=82> (last visited Feb. 26, 2010).

58. Molina B. Dayal & Shvetha M. Zarek, *Preimplantation Genetic Diagnosis*, EMEDICINE, Nov 11, 2008, <http://emedicine.medscape.com/article/273415-overview>.

59. See Zouves Fertility Center, IVF Breakthroughs, http://www.goivf.com/about_us/breakthroughs-pgd.php4 (last visited Feb. 26, 2010); see also Genetics and IVF Institute, What Is PGD?, <http://www.babyin2011.com/pgd/whatispgd.cfm> (last visited Feb. 26, 2010).

60. Laurel Fertility Care, PGD Pre-implantation Genetic Diagnosis Overview, <http://www.laurelfertility.com/treatment-options/treatment/ivf/pgd-preimplantation-genetic-diagnosis-overview> (last visited Feb. 26, 2010); Zouves Fertility Center, *supra* note 59. PGT is currently able to identify over sixty hereditary afflictions and has been responsible for over one thousand live births. GENETICS AND PUB. POLICY CTR., *supra* note 54, at 3; Zouves Fertility Center, *supra* note 59.

61. Laurel Fertility Care, *supra* note 60.

62. Landhuis, *supra* note 51.

63. Laurel Fertility Care, *supra* note 60.

Additionally, the long-term success of PGT in identifying diseases in the resulting children is unclear.⁶⁴ A negative or normal result may fail to detect a disease caused by multiple genetic mutations,⁶⁵ while a positive result may not conclusively establish that a disease will inevitably develop or will be chronic if it does occur.⁶⁶ Because of these shortcomings, doctors often recommend that parents continue with prenatal testing throughout a pregnancy.⁶⁷

B. Seeds of Wrongful-Birth Litigation in the PGT Context

The mighty intentions of PGT conflict with its varied risks, providing the grounds upon which hopeful parents may become disappointed and sue doctors for wrongful birth.⁶⁸ Most people are unable to recognize “whether or not they or their children are at increased risk of inherited disease” without medical diagnosis.⁶⁹ However, any diagnosis relying on a test like PGT may not be 100 percent accurate. Because PGT is a relatively new technology, a “major risk is that the procedure will not be successful in spite of all best efforts.”⁷⁰

In fact, a 2009 study has revealed important information about embryonic development that may affect PGT’s effectiveness.⁷¹ The study discovered that human embryos have “high chromosome instability, at least during the first few rounds of cell division,”⁷² which is when PGT is performed. It further found that 90 percent of “the cells in even healthy embryos have . . . chromosomal defects.”⁷³ Therefore, even if PGT is performed correctly, this study indicates that infants may still develop hereditary diseases despite embryonic

64. Zouves Fertility Center, *supra* note 59.

65. TASK FORCE, *supra* note 46, ch. 1.

66. *Id.*

67. GENETICS AND PUB. POLICY CTR., *supra* note 54, at 6.

68. *See* TASK FORCE, *supra* note 46, ch. 3.

69. *Id.* ch. 4; *cf.* INFERTILITY: MEDICAL AND SOCIAL CHOICES, *supra* note 42, at 301 (“It is impossible to exclude all sperm or egg donors capable of transmitting genetic disorders . . . [because] most couples conceiving a genetically abnormal child through intercourse show no characteristic that distinguishes them from [other] couples.”).

70. Zouves Fertility Center, *supra* note 59.

71. Nora Schultz, *Healthy Embryos Show Chromosome Flaws*, *TECH. REV.*, July 8, 2009, <http://www.technologyreview.com/biomedicine/22959>.

72. *Id.*

73. *Id.*

normalcy or may develop normally despite having an embryonic defect.⁷⁴

Although Congress passed the Clinical Laboratory Improvement Amendments of 1988⁷⁵ requiring doctors to fully and objectively divulge all the risks, benefits, and potential consequences of treatment,⁷⁶ these potential complications fit squarely within the wrongful-birth tort and therefore make wrongful-birth liability a looming concern.

IV. ETHICAL CONSIDERATIONS IN IMPOSING TORT LIABILITY IN PGT SCENARIOS

Tort liability has traditionally “evolved from the concept that law should be consistent with morality.”⁷⁷ Since morality is based on moral⁷⁸ standards that “direct human belief, reasoning, or behavior,”⁷⁹ the wrongful-birth tort must conform to these standards both in the abstract and in operation. Facially, the tort appears to be morally sound. However, a closer look at its operation reveals that it becomes morally indefensible when applied to PGT-related ethical problems.

A. Ethical Standards and Wrongful-Birth Liability in the Abstract

Reproduction is tied “to freedom and autonomy in the most basic way: the desire to have children and create a family is a natural expression of generative urges and commitments to religious, ethnic, and familial values that have characterized the human race from its

74. Interestingly, these findings also suggest that otherwise healthy embryos are being discarded during screenings for falsely testing positive for a genetic malady. *Id.*; see also Dayal & Zarek, *supra* note 58 (describing this phenomenon as “self-correction”); Leslie A. Pray, *Embryo Screening and the Ethics of Human Genetic Engineering*, NATURE EDUC., 2008, at 1, available at <http://www.nature.com/scitable/topicpage/Embryo-Screening-and-the-Ethics-of-60561> (discussing preimplantation genetic diagnosis and breast cancer).

75. TASK FORCE, *supra* note 46, ch. 3.

76. See *id.* chs. 1, 3; Howard Markel, *Scientific Advances and Social Risks: Historical Perspectives of Genetic Screening Programs for Sickle Cell Disease, Tay-Sachs Disease, Neural Tube*, in TASK FORCE, *supra* note 46, at app. 6.

77. J.D. LEE & BARRY A. LINDAHL, 1 MODERN TORT: LIABILITY AND LITIGATION § 3:1, at 3-3 (West 2d ed. 2002).

78. Although the terms *ethics* and *morals* have separate etymologies and may carry slightly different connotations, for the purposes of this Note they will be used interchangeably.

79. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 85 (6th ed. 2009).

beginning.”⁸⁰ The wrongful-birth tort focuses on safeguarding such freedoms.⁸¹

The moral standards of nonmaleficence, beneficence, and justice support reproductive autonomy,⁸² but they also set ethical requirements for legal safeguards therein. Nonmaleficence prohibits rules promoting harmful conduct to ensure that individuals “do no harm.”⁸³ Beneficence sets aspirational goals by promoting laws that prevent or remove harm and by encouraging morally desirable action, or “good” deeds.⁸⁴ Justice requires that individuals receive “fair, equitable, and appropriate treatment in light of what is due or owed.”⁸⁵ All individuals with some sensory ability and cognitive capacity have the right to have their interests respected under these standards.⁸⁶

If wrongful-birth liability is to conform to these moral guidelines and therefore be a morally appropriate tort, it must (1) not promote harmful action; (2) encourage good action; and (3) treat individuals fairly. In the abstract, wrongful-birth liability appears to fulfill these criteria.

Wrongful-birth liability conforms to nonmaleficence and beneficence because it gives legal weight to basic treatment guidelines for reproductive medicine. These guidelines include the Hippocratic oath, which places limits on a doctor’s potentially harmful conduct, and government recommendations requesting that doctors “refrain from using reproductive technologies in ways that might harm future generations.”⁸⁷ The tort discourages potentially harmful conduct⁸⁸ and promotes desirable action within the medical

80. INFERTILITY: MEDICAL AND SOCIAL CHOICES, *supra* note 42, at 205.

81. *See supra* Part II.

82. *See* BEAUCHAMP & CHILDRESS, *supra* note 79, at 103 (highlighting autonomy as a form of ultimate moral respect).

83. *Id.* at 149.

84. *Id.* at 199.

85. *Id.* at 241.

86. This is known as “moral standing.” *See id.* at 86. For the purposes of this Note, “moral standing” is broadly defined to take into consideration the rights of the parents, doctors, and children affected by PGT treatment.

87. INFERTILITY: MEDICAL AND SOCIAL CHOICES, *supra* note 42, at 11; *see also* The Hippocratic Oath: Classic Version, http://www.pbs.org/wgbh/nova/doctors/oath_classical.html (last visited Feb. 26, 2010); The Hippocratic Oath: Modern Version, http://www.pbs.org/wgbh/nova/doctors/oath_modern.html (last visited Feb. 26, 2010).

88. Although wrongful-birth liability protects abortion rights, in doing so, it does not violate the traditional “ethics of reverence for human life.” DAVID J. ROTHMAN, *STRANGERS AT THE*

community by providing a legal incentive for doctors to comply with these standards.

The tort also complies with the moral requirements of justice. Under the Aristotelian view of justice, “[e]quals must be treated equally, and unequals must be treated unequally.”⁸⁹ Although the tort treats doctors, parents, and children differently, it does not do so unethically because those parties are not similarly situated.⁹⁰ In reproductive medicine, doctors generally have superior knowledge compared with their patients or the children they help create, while parents have greater autonomous rights than their unborn children.⁹¹ The tort recognizes this power imbalance and places liability justly.

However, the tort may operate unjustly if it is interpreted as confusing the “quality of life” of disabled individuals with the “value” of the disabled child in general.⁹² The application of the tort highlights these problems and shows how wrongful-birth liability serves impermissible moral ends in its operation.

B. Ethical Problems in Applying Wrongful-Birth Liability in the PGT Context

Wrongful-birth liability is an appropriate legal solution only if it sufficiently conforms to ethical standards in response to two important PGT-related ethical dilemmas: discrimination against disabled individuals and eugenics. It fails to do so.

1. Discrimination Against Disabled Individuals

Respecting an individual’s reproductive autonomy requires recognizing that person’s right to initiate or terminate a pregnancy

BEDSIDE: A HISTORY OF HOW LAW AND BIOETHICS TRANSFORMED MEDICAL DECISION MAKING 181 (1991) (quoting *National Advisory Commission on Health Science and Society: Joint Hearing on S.J. Res. 75 Before the Subcomm. on Health and the Spec. Subcomm. on National Science Foundation of the Comm. on Labor and Public Welfare*, 92d. Cong. 29 (1971)). Abortion affects embryos, which, as entities lacking sentience and cognition, lack moral standing and therefore any moral interests for the tort to respect. Parents, on the other hand, do have moral standing. See BEAUCHAMP & CHILDRESS, *supra* note 79, at 86–89. The tort respects this by honoring their reproductive autonomy.

89. BEAUCHAMP & CHILDRESS, *supra* note 79, at 242.

90. *Id.* at 105.

91. See *id.* at 105, 107.

92. *Id.* at 170.

for any reason.⁹³ However, with the use of PGT, this may amount to permitting individuals to stigmatize disabilities⁹⁴ and create “savior siblings” for their afflicted older children.⁹⁵

The therapeutic application of PGT may ultimately result in stigmatizing disabilities.⁹⁶ Disability rights advocates and the disabled oppose terms often used in the screening and selection process such as “disease,”⁹⁷ “good genes”, and “normal traits.”⁹⁸ These labels reinforce the negative perception of various disabilities.⁹⁹ The imposition of wrongful-birth liability could further validate the idea that “a congenitally defective child [is] ‘tak[ing] up’ a place in a family that would otherwise be filled by a ‘normal’ child.”¹⁰⁰ Rather than acting as a positive moral force, in such circumstances wrongful-birth liability would be promoting stigmas based on genetic differences that may not otherwise “limit an individual’s ability to live a useful and satisfying life.”¹⁰¹ This is particularly true when PGT is performed for adult-onset diseases in which a child may only have a slight chance of contracting an ailment after years of living a “normal” life.¹⁰²

Additionally, a small but growing number of parents have used PGT with the intent to create a “savior child”—a younger child who can serve as a tissue match for an afflicted older child.¹⁰³ This raises grave concerns about the quality of life of and the amount of pressure placed on savior children, as well as whether the value of their lives

93. See Note, *Regulating Preimplantation Genetic Diagnosis: The Pathologization Problem*, 118 HARV. L. REV. 2770, 2789 (2005) [hereinafter *Regulating Preimplantation Genetic Diagnosis*].

94. *Id.* at 2778.

95. Center for Genetics and Society, *supra* note 57.

96. *Regulating Preimplantation Genetic Diagnosis*, *supra* note 93, at 2778–79.

97. See Center for Genetics and Society, *supra* note 57.

98. Center for Genetics and Society, Disability, <http://www.geneticsandsociety.org/article.php?list=type&type=98> (last visited Feb. 26, 2010).

99. *Regulating Preimplantation Genetic Diagnosis*, *supra* note 93, at 2779–80.

100. Capron, *supra* note 2, at 656.

101. GENETICS AND PUB. POLICY CTR., *supra* note 54, at 6.

102. *Id.* at 5; see, e.g., Tania Simoncelli, *Pre-Implantation Genetic Diagnosis and Selection: From Disease Prevention to Customized Conception*, DIFFERENTAKES, Spring 2003, available at http://popdev.hampshire.edu/sites/popdev/files/uploads/dt/DifferenTakes_24.pdf (discussing the prevention of adult-onset diseases at birth).

103. John F. Kilner, *Poor Prognosis for Preimplantation Genetic Diagnosis (PGD)?*, CENTER FOR BIOETHICS AND HUM. DIGNITY, Aug. 6, 2004, http://www.bioethix.net/resources/reproductive/kilner_2004-08-06.htm; Simoncelli, *supra* note 102.

is being degraded.¹⁰⁴ In an area of medicine where “science literally subsumes the role of God,”¹⁰⁵ allowing some children to be default organ donors for their siblings suggests that some human beings lack enough value as individuals to justify their existence as autonomous actors.¹⁰⁶ Permitting recovery under wrongful-birth liability in this context would only give legal reinforcement to these unjust considerations.

Because of these ethically charged situations, most courts are unwilling to “accept[] the general argument that there can be instances in which an impaired life is worse than no life at all.”¹⁰⁷ Citing judicial incompetence, one court suggested that “[w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians” than to the law.¹⁰⁸ After all, allowing wrongful-birth liability in the PGT setting would give legal “validation to some of our deepest fears and prejudices about what it is to live with, or to support people with, cognitive or physical impairments.”¹⁰⁹ Such recognition would violate principles of justice.

All human beings, including healthy and impaired children, have some value and therefore some rights that should be respected. Although justice permits disparate treatment of dissimilar groups, by compensating parents for the births of impaired children—particularly impaired savior children—the law goes beyond treating parties unequally to plainly stigmatizing them. When the law provides remuneration for impaired children, it devalues those children’s lives, treats them like commodities, and, with savior children, suggests they are valuable only as curative tools. This flagrantly violates principles of justice requiring society to not value

104. See generally Simoncelli, *supra* note 102 (discussing the potential instrumentalization of savior children, and the pressure on savior children to donate tissue or organs if the original transplant fails).

105. GENETICS AND PUB. POLICY CTR., *supra* note 54, at 1.

106. Kilner, *supra* note 103.

107. GENETICS AND PUB. POLICY CTR., *supra* note 54, at 9; see, e.g., Turpin v. Sortini, 643 P.2d 954, 962 (Cal. 1982) (“[W]e do not think that it is accurate to suggest that this state’s public policy establishes—as a matter of law—that under all circumstances ‘impaired life’ is ‘preferable’ to ‘nonlife.’”).

108. Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978).

109. Timothy Krahn, Commentary, *Where Are We Going with Preimplantation Genetic Diagnosis?*, 176 CAN. MED. ASS’N J. 1445, 1445 (2007), available at <http://www.cmaj.ca/cgi/reprint/176/10/1445.pdf>.

individuals based upon their usefulness to others.¹¹⁰ Therefore, extending liability in such circumstances would lead to morally perverse outcomes.

2. Eugenics

Many of the world's "worst medical atrocities to date have been rationalized with the notion that there is something wonderful to achieve and no other way to achieve it."¹¹¹ Recent incidents involving sex selection for gender balancing within families¹¹² raise concerns that PGT may be used for population engineering reminiscent of "George Orwell's *1984*, with political misuse and social control of the most egregious sort."¹¹³

Compelled by these fears, the Michigan Court of Appeals abolished the tort of wrongful birth in the case of *Taylor v. Kurapati*.¹¹⁴ There, a doctor informed a couple during routine ultrasounds that nothing appeared to be wrong with their child other than shorter-than-average femurs. In reality, the child had severe abnormalities that included fused elbows, missing digits, a missing left femur, and a short right femur.¹¹⁵

In rejecting wrongful-birth liability, the court cited "profoundly disturbing" consequences of imposing tort liability, such as legally sanctioned eugenics or "selective procreation."¹¹⁶ It alluded to a gruesome specter of forced sterilization in the United States tantamount to a Nazi program in which 360,000 to 3,500,000 victims were sterilized in 1930s Germany.¹¹⁷

110. See *supra* Part IV.A.

111. Kilner, *supra* note 103 (referring to not only Nazi medical programs but also the ethical violations in American medical research as documented by Henry Beecher in the *New England Journal of Medicine*).

112. Simoncelli, *supra* note 102; see also, GENETICS AND PUB. POLICY CTR., *supra* note 54, at 3 (indicating that genetic tests can be used for more than mere genetic screening and diagnosis); Landhuis, *supra* note 51 (suggesting that the development of PGT can lead to the selection of traits for athletic ability).

113. ROTHMAN, *supra* note 88, at 174; see also Matt Collins, *The Need to Regulate "Designer Babies"*, SCI. AM. MAG., May 2009, available at <http://www.scientificamerican.com/article.cfm?id=regulate-designer-babies> (highlighting fears of "*Gattaca*, *Brave New World* and, of course, the Nazis' quest for a blonde, blue-eyed race of Aryans"); Pray, *supra* note 74, at 1.

114. 600 N.W.2d 670, 673 (Mich. Ct. App. 1999).

115. *Id.* at 673-74.

116. *Id.* at 688.

117. *Id.* at 690 & n.52; see also Center for Genetics and Society, *supra* note 98 (discussing the Nazi extermination of 100,000 disabled people).

While most Americans may find it unfathomable that the United States could emulate Nazi Germany, it has happened before—although without expressed recognition—in the scientific research context. Primary examples of these past actions include the Tuskegee syphilis experiment, testing on mentally incapacitated children at the Willowbrook State School, and using unwitting patients at the Jewish Chronic Disease Hospital for cancer experiments.¹¹⁸ Such atrocities could happen with PGT testing.

Wrongful-birth liability would pave the way to the legally sanctioned abuse of reproductive autonomy. By compensating parents when their children are not born “perfect,” this tort could lead to courts and legislatures prescribing how children should be. While this may be technically just, it does suggest that strict adherence to principles of beneficence may violate nonmaleficence. Essentially, a shortsighted focus on providing the best for one’s child may actually result in harm to society.

It is a slippery slope. If a doctor has a duty to parents to comply with the parents’ wishes, and parents have a duty to ensure decisions are made in the best interests of their children, then the kinds of decisions leading to eugenics appear morally acceptable or even commendable on their face. However, too much of a “good thing” can cause morally impermissible harm to society. Nazi Germany remains a foreboding precedent on this issue that should not be ignored, as unfathomable as the re-creation of eugenics in America may seem.

V. THE LEGAL SHORTCOMINGS OF THE WRONGFUL-BIRTH TORT IN THE PGT CONTEXT UNDER TRADITIONAL TORT LAW

Tort law acts as a means to promote “social control of risks to health and safety” by compensating individuals for their harms and establishing nonregulatory quality controls.¹¹⁹ Accordingly, doctors have grown to “accept[] external scrutiny of all aspects of their professional performance”¹²⁰ through the courtroom. Therefore, even though reproductive medicine is quality controlled by consumer

118. BEAUCHAMP & CHILDRESS, *supra* note 79, at 97 n.38.

119. INFERTILITY: MEDICAL AND SOCIAL CHOICES, *supra* note 42, at 175.

120. See ABIM Foundation et al., *supra* note 41, at 246.

protection groups, state legislatures, professional societies, and individuals,¹²¹ the courts can further regulate it via wrongful-birth liability.

However, the mere existence of this tort does not make its application just in all circumstances. As the following legal analysis¹²² suggests, wrongful-birth liability provides the kinds of “contradictory standards or confusing stipulations” that “legal minds abhor.”¹²³

A. The Doctor’s Duty and Foreseeability

Duty is the cornerstone of the negligence tort. It establishes a basis on which a plaintiff may recover from an alleged tortfeasor.¹²⁴ Without it, “[a] man is entitled to be as negligent as he pleases towards the whole world.”¹²⁵

Legal duties turn on public policy¹²⁶ and can result from special relationships between individuals.¹²⁷ In the wrongful-birth tort, a duty is presumed from the existence of the doctor-patient relationship. However, in the PGT context, merely because a doctor-patient relationship exists¹²⁸ does not mean that wrongful-birth liability should automatically attach. Tort law customarily considers whether public policy demands a departure from imposed obligations based upon the concept of foreseeability.¹²⁹

121. INFERTILITY: MEDICAL AND SOCIAL CHOICES, *supra* note 42, at 175; *see also id.* at 172.

122. The legal analysis here is divided into two parts: (1) duty and causation; and (2) cognizable injury. Breach and damages issues are purposefully not addressed in this Note.

123. ROTHMAN, *supra* note 88, at 232.

124. *Dillon v. Legg*, 441 P.2d 912, 917 (Cal. 1968).

125. *Id.* (quoting *Le Lievre v. Gould* (1893) 1 Q.B. 491, 497).

126. *Id.* at 914.

127. *See* LEE & LINDAHL, *supra* note 77, § 3:11, at 3-29.

128. As a general matter of law, doctors are held to a professional standard of care. This means they have an affirmative legal duty to act as reasonable professionals within the same specialty would act when treating patients. INFERTILITY: MEDICAL AND SOCIAL CHOICES, *supra* note 42, at 248. This standard presumptively applies to genetic testing like PGT. *See Johnson v. Superior Court*, 124 Cal. Rptr. 2d 650, 664 (Ct. App. 2002) (concluding that genetic screening is an “ordinary and usual part of the medical professional services provided by real parties”); INFERTILITY: MEDICAL AND SOCIAL CHOICES, *supra* note 42, at 248.

129. *See* BEAUCHAMP & CHILDRESS, *supra* note 79, at 166 (stating that some obligations should be made optional rather than obligatory).

Foreseeability is necessary to impose tort liability.¹³⁰ Within the duty analysis, the foreseeability analysis addresses to what extent a particular category of defendants should be expected to foresee a particular type of harm occurring to a category of plaintiffs.¹³¹ Here, the inquiry is whether a doctor should be held liable for failing to foresee that a couple successfully conceiving via IVF would lose the opportunity to abort their baby because PGT failed to detect a genetic impairment.

Policy considerations help answer this question. Such considerations include (1) the proportion of an actor's culpability to liability; (2) moral concerns; and (3) judicial economy.¹³²

Generally, tort liability requires some degree of culpability.¹³³ Imposing liability that is either unrelated or disproportionate to the degree of a doctor's culpability may unnecessarily chill the use of reproductive technologies like PGT. Given the limitations of PGT, if wrongful-birth liability is applied, such chilling effects are a realistic possibility. After all, doctors are not gods. PGT cannot prevent all genetic mutations or guarantee the birth of a perfect child;¹³⁴ the development of a child is still subject to the will of nature. Early-stage embryos are notably unstable,¹³⁵ so it is quite possible that a child could develop genetic impairments even if a doctor correctly performed PGT. Therefore, any subsequent deprivation of reproductive rights may be the result of the parents' ignorance of PGT's shortcomings and nature's ways, rather than a mistake the doctor made.

Moreover, morality instructs against the application of wrongful-birth liability. Traditional state interests favoring equality and preservation of life,¹³⁶ which the law generally follows, stand opposed to discrimination against disabled individuals and

130. *Dillon*, 441 P.2d at 919; *see also* *Grafton v. Mollica*, 42 Cal. Rptr. 306 (1965); *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

131. *LEE & LINDAHL*, *supra* note 77, § 5:1, at 5-4.

132. *Thing v. La Chusa*, 771 P.2d 814, 818-19 (Cal. 1989).

133. *LEE & LINDAHL*, *supra* note 77, § 3:1, at 3-3.

134. *See supra* Part III.B.

135. *See* *Schultz*, *supra* note 71.

136. *See, e.g.*, *Pac.-Union Club v. Superior Court*, 283 Cal. Rptr. 287, 298 (Ct. App. 1991) (noting the "state's interest in not subsidizing discrimination against its citizens"); *Superintendent of Belcher State Sch. v. Saikewicz*, 370 N.E.2d 417, 425 (Mass. 1977) (identifying the preservation of life as an important state interest).

eugenics—two prevailing ethical concerns in this area. Permitting liability in wrongful-birth circumstances would be theoretically tantamount to a state-sanctioned policy devaluing the disabled and promoting eugenics, a frightening possibility. It would also degrade the ethical integrity of the medical profession¹³⁷ by turning it into a tool to promote morally impermissible and socially unacceptable policies and practices.

Additional concerns regarding effective judicial administration weigh against imposing liability. This public policy addresses the “twin fears that courts will be flooded with an onslaught of (1) fraudulent and (2) indefinable claims”¹³⁸ if tort liability is imposed. Since it is unlikely that fraudulent claims will be brought against doctors by couples who had successful IVF treatment, the concerns here focus upon “indefinable” claims. First, as alluded to earlier, it may be difficult for couples to prove that the doctor’s actions resulted in the deprivation of their rights. Second, the amorphous nature of the injury may also make the duty element of the tort analysis messy and confusing. While the law refrains from denying liability solely because of administrative problems,¹³⁹ these problems along with other pressing policy concerns weigh against broadening the doctor’s duty in the doctor-patient relationship to include this particular risk.

B. The Nature of the Cognizable Injury and the Causation Mechanism

The second and third elements that tort law requires to impose liability are (1) a cognizable injury (2) caused by the alleged tortfeasor. In a wrongful-birth action, parents must demonstrate that they would have terminated the pregnancy if they had knowledge that their child was genetically impaired.¹⁴⁰ Imposing wrongful-birth liability in the PGT context raises concern over the nature of this injury and the causation mechanism behind it.

137. See *Saikewicz*, 370 N.E.2d at 425; see also *Bartling v. Superior Court*, 209 Cal. Rptr. 220, 225 (Ct. App. 1984).

138. *Dillon v. Legg*, 441 P.2d 912, 917 (Cal. 1968).

139. See *id.* at 918 (holding that the “interests of meritorious plaintiffs should prevail over alleged administrative difficulties”).

140. *Keel v. Banach*, 624 So. 2d 1022, 1024 (Ala. 1993).

1. Injury

The cognizable injury of a wrongful-birth claim is the deprivation of the right to terminate the pregnancy.¹⁴¹ It is believed that “[t]he deprivation of choice harms both parties who have an interest in the parents being informed decision makers: the child and the parents themselves”¹⁴² because the child’s disability complicates both the parent-child relationship and the impaired child’s life.¹⁴³

The difficulty of proving this injury has been met with “greater leniency in affording the remedy, rather than a denial of plain justice.”¹⁴⁴ Notably in California, courts permitting wrongful-birth liability appear to *presume* the birth of an impaired child as proof that the parents were deprived of their right to terminate the pregnancy, rather than *analyze the evidence* to see if it shows that the parents would have exercised their right to terminate the pregnancy had they known of the child’s medical condition.¹⁴⁵ This analytical framework is concerning regardless of the context in which wrongful-birth liability is applied because it essentially overlooks a necessary fact-intensive inquiry in the injury prong of the tort analysis, and it raises potential ethical problems such as discrimination against the disabled.

141. Plaintiffs in two wrongful-birth cases have claimed that the injury in a wrongful-birth action is the child’s genetic defect. *See Johnson v. Superior Court*, 124 Cal. Rptr. 2d 650, 653–54 (Ct. App. 2002); *GENETICS AND PUB. POLICY CTR.*, *supra* note 54, at 9; *see also Becker v. Schwartz*, 386 N.E.2d 807, 816–19 (N.Y. 1978) (Wachtler, J., dissenting in part) (discussing incurable genetic mutations and causation). In one case, the plaintiffs attempted to recover damages for “loss of consortium,” based upon the presumed loss of joy they would have gotten from a healthy, non-afflicted child; this theory was rejected as speculative. *GENETICS AND PUB. POLICY CTR.*, *supra* note 54, at 9. The other case was an action against a sperm bank and its doctors for their failure to disclose that the donor had a history of kidney disease. *Johnson*, 124 Cal. Rptr. 2d at 653–54. The court rejected this claim, stating that it was a gene in the sperm, as opposed to the doctors’ failure to disclose, that caused the affliction. *Id.* at 666.

142. Capron, *supra* note 2, at 652.

143. *See Schroeder v. Perkel*, 432 A.2d 834, 845 (N.J. 1981) (Handler, J., concurring and dissenting); *Scott v. McPheeters*, 92 P.2d 678 (Cal. Ct. App. 1939), *superseded by statute*, CAL. CIV. CODE § 29, *as recognized in Myers v. Stevenson*, 270 P.2d 885 (Cal. Ct. App. 1954).

144. *Scott*, 92 P.2d at 682.

145. *See, e.g., Turpin v. Sortini*, 643 P.2d 954, 960–61 (Cal. 1982) (identifying the nature of the injury asserted and indicating the analysis is based on evaluating whether nonexistence of the child would have been preferable to the birth of the child in its impaired state). At least one non-California court has come out against this logic claiming it runs afoul of well-established tort principles. *Azzolino v. Dingfelder*, 337 S.E.2d 528, 533–34 (N.C. 1985) (“holding that the existence of a[n impaired] human life can constitute an injury cognizable at law . . . requires a view of human life previously unknown to the law of this jurisdiction”).

Furthermore, because the cognizable injury in the wrongful-birth tort is based on a right implied from the penumbras in the U.S. Constitution, the imposition of wrongful-birth liability against private actors, such as doctors, is misplaced. While the reproductive right recognized in *Roe* cannot be denied, state courts permitting tort liability against private actors have taken a leap beyond the holding in that case. *Roe* and its progeny established that a woman has the right to terminate her pregnancy, and that state regulations of abortion are permissible so long as they do not impose undue burdens.¹⁴⁶ The decision in *Roe* focused only on the deprivation of the right by *government* actors and considered the issue only in the state-citizen context. It did not address the actions of private parties receiving private medical treatment. Therefore, wrongful-birth liability seeks to extend the *Roe* analysis beyond its intended context and treats private fertility doctors as if they were government actors depriving private citizens of their constitutional rights.

This makes the injury alleged in a wrongful-birth action, either in PGT or in other contexts, legally nonsensical. First, tort liability does not arise from the mere existence of constitutional rights. If it did, then it would be completely permissible to allow a patient to sue a doctor for infringing on the patient's right to freedom of speech because the doctor negligently damaged the patient's vocal cords. This does not happen, nor should it be allowed to happen under the law. Therefore, when parents in a wrongful-birth action allege the deprivation of a constitutional right as the injury, the parents inappropriately distort tort law.

2. Causation

Imposing wrongful-birth liability in the PGT context also presents complications with the causation analysis in tort law. Under California law, causation focuses on whether the defendant's conduct was a "substantial factor in bringing about the harm."¹⁴⁷ Most jurisdictions permitting wrongful-birth claims are "almost unanimous

146. See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding that the undue burdens test should be used for evaluating abortion restrictions before viability); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that state statutes criminalizing abortion are unconstitutional).

147. *Osborn v. Irwin Mem'l Blood Bank*, 7 Cal. Rptr. 2d 101, 108 (Ct. App. 1992) (quoting *Maupin v. Widling*, 237 Cal. Rptr. 521 (Ct. App. 1987)) (indicating that the substantial factor test also subsumes the but-for test, which requires that the injury would not have occurred absent the defendant's conduct).

in . . . [presuming that] but for the defendants' negligence, the parents would have terminated the defective fetus by abortion."¹⁴⁸

However, this presumption is misplaced, especially in the PGT context. PGT presents an instance in which an infertile couple and a doctor have invested considerable time and money to ensure pregnancy. Any embryo that successfully implants may arguably produce the only child that couple will ever have considering both the costs and complications of the procedure.¹⁴⁹ Since "causation in fact is ultimately a matter of probability and common sense,"¹⁵⁰ under these circumstances it would be improper to conclude that a couple would have aborted this child if were genetically impaired.

The fact that PGT itself is an advanced technology further bolsters this point. The California Court of Appeal held in *Osborn v. Irwin Memorial Blood Bank*¹⁵¹ that a blood bank was not liable for negligence for a blood transfusion that gave an infant AIDS.¹⁵² The court reasoned that the blood bank was "doing as much if not more in the areas of testing and screening than any other blood bank in the country."¹⁵³ The same reasoning should apply to bar PGT-related wrongful-birth claims. The test is cutting-edge, state-of-the-art technology,¹⁵⁴ so any doctor using it would be doing "more in the areas of testing and screening"¹⁵⁵ than most other doctors in the country to try to prevent birth defects. Therefore, if parents rely only on the test to prevent congenital diseases and ignore the doctor's advice to continue with prenatal monitoring,¹⁵⁶ they do so at their own risk.

After all, "the common law does not assume to protect [a person] from the effects of his own personality and from the consequences of his voluntary actions."¹⁵⁷ In the IVF process,

148. *Azzolino*, 337 S.E.2d at 533.

149. *See supra* Part III.

150. *Osborn*, 7 Cal. Rptr. 2d at 108.

151. 7 Cal. Rptr. 2d 101 (Ct. App. 1992).

152. *Id.* at 104.

153. *Id.*

154. *See supra* Part III.

155. *Osborn*, 7 Cal. Rptr. 2d at 104.

156. *See* GENETICS AND PUB. POLICY CTR., *supra* note 54, at 6.

157. Francis H. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 14 (1906). This concept is reflected throughout the law. For instance, one California civil jury instruction states that "[a] patient must use reasonable care to provide for his or her own well-being." CACI No. 517 (2008).

regulations require that patients be apprised of all the risks and complications of the procedure before undergoing it.¹⁵⁸ As patients, parents have a duty to reasonably ensure their own well-being based upon the information they receive. They should not, therefore, be allowed to shift the burden of this duty onto doctors when they fail to take appropriate action for themselves and their future children.

VI. RECONCILING ETHICAL AND TRADITIONAL LEGAL SHORTCOMINGS IN IMPOSING WRONGFUL-BIRTH LIABILITY BY TURNING TO THE INFORMED CONSENT DOCTRINE

One of the fundamental difficulties in the common law is “realistically limiting liability for [the unintentional] consequences” of an individual’s actions.¹⁵⁹ Liability should be fixed only where there is some moral blame associated with a party’s actions,¹⁶⁰ and even then it should be set in proportion to that party’s culpability.¹⁶¹ Where one area of the law fails to adequately address these concerns, another may step in to do so.¹⁶² As the preceding parts of this Note have explained,¹⁶³ there are multiple problems with imposing liability for wrongful birth in the PGT context. Informed consent, on the other hand, represents at least one theory that provides for recovery in line with moral considerations and legal traditions.

The doctrine of informed consent is premised on the right of bodily integrity.¹⁶⁴ It has its genesis in the post–World War II decades, when “the doctor became a stranger and the hospital a strange place.”¹⁶⁵ The transformation of medicine from an intimate long-term relationship between patient and doctor to a business with highly specialized practice areas necessitated greater disclosure between doctors and patients.¹⁶⁶

158. *Supra* Part III.B.

159. *Molien v. Kaiser Hosp.*, 616 P.2d 813, 825 (Cal. 1980) (Clark, J., dissenting).

160. *Id.* (quoting *Biakanja v. Irving*, 320 P.2d 16, 19 (1968)).

161. *Id.*

162. *See* *Scott v. McPheeters*, 92 P.2d 678, 682–83 (Cal. Ct. App. 1939), *superseded by statute*, CAL. CIV. CODE § 29, *as recognized in* *Myers v. Stevenson*, 270 P.2d 885 (Cal. Ct. App. 1954) (“Law is progressive and should lend its aid to secure justice rather than to block it.”).

163. *See supra* Parts IV & V.

164. *See* ALDERMAN & KENNEDY, *supra* note 17, at 18.

165. ROTHMAN, *supra* note 88, at 11.

166. *See generally id.* (discussing the increasing rift between doctors and patients and responses to this rift).

There is now a similar need in the genetic-testing field because the industry has become more commercialized.¹⁶⁷ Indeed, case law has pointed out that the advances in reproductive technology entail an “increasingly heavy burden [on doctors] . . . to obtain [patients’] informed consent.”¹⁶⁸

Ethical guidelines for the field “strongly advocate[] written informed consent, especially for certain uses of genetic tests, including . . . predictive testing.”¹⁶⁹ Under these guidelines, responsibility is placed on the doctor “[p]rior to the initiation of predictive testing in clinical practice, . . . [to] describe the features of the genetic test, including potential consequences, to potential test recipients.”¹⁷⁰ This responsibility includes disclosing information regarding “the purposes of the test, the chance it will give a correct prediction, the implications of test results, the options, and the benefits and risks of the process.”¹⁷¹ At least one law review article has suggested that courts should refer to standards governing informed consent¹⁷² in determining liability stemming from a doctor’s failure to communicate unforeseen risks.

Informed consent requirements in PGT would provide the quality control otherwise ineffectively sought through wrongful-birth liability but without the problematic consequences of promoting discrimination against the disabled or eugenics.¹⁷³

Under the informed consent doctrine, the liability analysis focuses on whether or not a party fully understood the consequences of a treatment before voluntarily authorizing it.¹⁷⁴ By focusing on the disclosure of information from doctor to patient, this cause of action promotes patient autonomy and therefore squarely addresses the

167. TASK FORCE, *supra* note 46, ch. 1.

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

169. TASK FORCE, *supra* note 46, ch. 1.

170. *Id.*; see also ABIM Foundation et al., *supra* note 41, at 244 (“Physicians should also acknowledge [in discussions with patients] that in health care, medical errors that injure patients do sometimes occur.”).

171. TASK FORCE, *supra* note 46, ch. 1.

172. Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L. J. 1488, 1506–07 (1978) [hereinafter *Father and Mother Know Best*].

173. See *supra* Part IV.B.1–2.

174. See BEAUCHAMP & CHILDRESS, *supra* note 79, at 120–21.

policy concerns that prompted California to adopt the wrongful-birth tort in the first place.¹⁷⁵

The informed consent doctrine also conforms to the same ethical standards as the wrongful-birth tort but without the collateral effect of promoting morally impermissible outcomes. The doctrine's disclosure requirement accords with nonmaleficence and beneficence¹⁷⁶ by helping ensure that no harm comes to patients and assuring that proper steps are taken to prevent it. It also ensures that all similarly situated patients receive the same information.

Furthermore, the informed consent doctrine addresses the shortcomings otherwise faced in the duty, injury, and causation inquiries in a wrongful-birth action. The informed consent doctrine creates a clear duty of care owed by a doctor to a patient¹⁷⁷ without distorting the concept of foreseeability, and its violation is a well-established tort.¹⁷⁸ Its injury and causation frameworks are similarly straightforward. They rely upon a showing "that a reasonable person, properly informed of the medical dangers associated with the available procedures and with nontreatment, would not have submitted to the procedure."¹⁷⁹ Parents could still allege the birth of their disabled child or deprivation of their reproductive choice as an injury. However, the informed consent doctrine would force parents to accept responsibility for their actions if they were aware of the risks, they accepted these risks, and their child was born impaired. Doctors would be held liable only if the information they provided were incorrect, insufficient, or misleading. By ensuring that accurate information is transmitted between patients and doctors, this cause of action also bolsters the ethical integrity of the medical community.

Moreover, imposing this duty would not chill the development of medical technology or the growth of reproductive medicine. Because informed-consent-like provisions already exist within the

175. *Foy v. Greenblott*, 190 Cal. Rptr. 84, 89, 91 (Ct. App. 1983) (imposing wrongful-birth liability to carry out "a public policy [in favor] of maximizing patients' individual autonomy, reproductive choice, and rights of informed consent").

176. *Cf. supra* Part IV.A.

177. *See Cobbs*, 502 P.2d at 4-5.

178. *See, e.g., Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990); *Truman v. Thomas*, 611 P.2d 902 (Cal. 1980); *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972).

179. *Father and Mother Know Best*, *supra* note 172, at 1509.

reproductive-medicine community to address these issues,¹⁸⁰ permitting recovery under the informed consent doctrine would not impede the industry in any substantial way.

Despite concerns that an informed consent requirement in PGT could “[i]nvariably . . . place increased pressure upon physicians to take the ‘safe’ course by recommending abortion,”¹⁸¹ this is unlikely to happen. The premise of the informed consent doctrine is *not* to tell patients what kind of decisions they should be making. Rather, it is to sufficiently inform patients so they are able to make the proper decision, freely and voluntarily, based upon their own personal interests.¹⁸²

Therefore, relying on the informed consent doctrine rather than the tort of wrongful birth to provide quality control of IVF and PGT treatment would be not only sensible but simple.

VII. CONCLUSION

The development of new medical technology challenges litigators and courts to find the best legal theories to address grievances and uphold social values and legal precedent. The challenge posed by PGT can be effectively addressed by well-established tort law. While wrongful-birth liability would appear to be a natural avenue for recourse, as this Note has shown, it actually proves to be an imperfect framework. It raises alarming ethical issues and promotes a distorted view of tort law. Other legal theories, such as the informed consent doctrine, can solve these problems without causing new ones. Therefore, when issues arise from PGT treatment, counsel and the courts should strive to apply a theory that honors both traditional legal principles and overarching ethical considerations, and therefore reject wrongful-birth liability.

180. See *supra* Part III.B.

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

182. BEAUCHAMP & CHILDRESS, *supra* note 79, at 120–21; see also TASK FORCE, *supra* note 46, ch. 1 (“A non-directive approach is of the utmost importance.”).