THE DUTY TO PREVENT HANDICAPS: LAWS PROMOTING THE PREVENTION OF HANDICAPS TO NEWBORNS

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I. INTRODUCTION

Lawmakers addressing the problem of legal rights of the handicapped traditionally have tended to focus on the legal rights afforded those persons already possessing certain physical or mental handicaps. Specifically, their focus has usually centered on either the rights of the handicapped to compensation, or their rights related to opportunities in employment, rehabilitation, or mobility. Commentators have paid little attention to the legal rights, if any, that may be afforded those not yet handicapped, or to legal rights designed to prevent future handicaps. This failure is unfortunate because social policy favors the avoidance or elimination of handicaps wherever possible.

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1. See, e.g., CAL. HEALTH & SAFETY CODE § 250 (West 1979) (intent of legislature to provide for the necessary medical services required by physically handicapped children whose parents are unable to pay for these services); id. § 341 (West Supp. 1982) (program of medical care and social support services for persons with handicapping conditions). Of course, through tort recovery and by other means, laws allow the handicapped to obtain compensation for handicaps from those who caused such handicaps.


3. 42 U.S.C.A. § 701(a)(2) (West Supp. 1975-1981) (authorization of appropriations for states to reduce "the incidence of preventable diseases and handicapping conditions among children"); 42 U.S.C. § 241(a) (Supp. IV 1980) (mandating that the Secretary of Health and Human Services promote research relating to the prevention of physical and mental diseases and impairments of man); CAL. HEALTH & SAFETY CODE § 150(c) (West 1979) (state policy to alleviate or cure hereditary disorders); id. § 309
This lack of commentary on the propriety of laws designed to prevent handicaps is particularly troublesome. Recent scientific advances have increased the understanding of the causes and prevention of many forms of physical and mental handicaps. Many of these advances involve handicaps that can be projected or discovered prior to birth, the prevention of which can be furthered by legal regulation of the various stages of life, or potential life, prior to live birth. While undoubtedly there has been tremendous growth in the legal rights of a handicapped infant through compensation from those responsible for the handicaps, and through other opportunities for a meaningful future life, further legal regulation is needed to prevent those handicaps which are reasonably certain to occur. Compensation for handicaps is not only less desirable than their prevention, but in many cases compensation is not presently available for preventable handicaps.

In focusing on the means by which laws can prevent handicaps for future generations, at least four distinct inquiries should be made. First, attention must be paid to the type of conduct that can be subjected to legal regulation, that is, what constitutes unreasonable conduct or perhaps reasonable but unwarranted conduct toward the unborn? Second, note must be taken of the people who can be subjected to legal regulation, that is, who can be made legally responsible for their conduct toward the unborn? Third, consideration must be given to the appropriate type of legal regulator, that is, who can be made responsible for setting the standards of legally acceptable conduct toward the unborn? Fourth, inquiry must be pursued on the possible sanctions available for the violations of any legal regula-


4. With these advances have come both legal change and legal commentary. On advances in genetics, see P. Reilly, Genetics, Law and Social Policy (1977); Rogers, Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing, 33 S.C.L. Rev. 713 (1982); Waltz & Thigpen, Genetic Screening and Counseling: The Legal and Ethical Issues, 68 Nw. U. L. Rev. 696 (1973).

5. For reports of recent surgeries on fetuses, see Medicine—Surgery in the Womb: Operating on the Fetus to head off birth defects, Time, Aug. 10, 1981, at 59 (Calif. hydronephroses and hydrocephalus cases); Surgery on fetus, Akron Beacon J., May 11, 1982, at A7 (Connecticut case involving massively bloated kidney); Surgery on fetus offers new hope, Akron Beacon J., March 11, 1982, at A7; 24-week-old fetus survives surgery out of the womb, Akron Beacon J., Nov. 15, 1981, at G1 (each case involving out of womb surgery on fetus, which was later returned to the womb).
tions, that is, what happens to those who act irresponsibly toward the unborn?

These inquiries should not be foreclosed or delayed because recent scientific advances provide less than definitive conclusions regarding the causes and means of preventing handicaps. While preliminary or tentative scientific findings counsel caution in the implementation of legal standards, there is currently much that can be done to prevent the "costly and tragic and sometimes deadly burdens to the health and well-being" of the citizenry prompted by the birth of handicapped newborns. As scientific and medical advances produce more definitive conclusions, the inquiries should quickly be made and legal action therefrom should promptly be implemented. There looms the prospect of unprecedented harm if the traditional lag or delay between scientific advance and legal change is tolerated.7

II. CONTEMPORARY SCIENTIFIC AND MEDICAL UNDERSTANDING OF PREVENTING HANDICAPS TO NEWBORNS

The past few years have brought significant advances to our understanding of the causes and the prevention of many handicaps of the newborn. This understanding encompasses the various stages of a newborn's potential life including: preconception; postconception, but previability; postconception and postviability, but prebirth; and birthing. It also encompasses the various people responsible for the newborn's birth, including the mother, the father, and the attending medical personnel. Additionally, it encompasses the varying physical as well as mental handicaps afflicting newborns. An awareness of this understanding of handicaps can be gleaned not only from contemporary medical texts and journals, many of which are incomprehensible to most of us, but also from legal developments during the last two decades, which are at times more comprehensible.

During the preconception stage, the potentiality of handicaps for those subsequently born alive may be triggered by maternal, paternal, or parental acts. Thus, in Jorgensen v. Meade Johnson Labo-

6. CAL. HEALTH & SAFETY CODE § 150(b) (West 1979); MD. PUB. HEALTH CODE ANN. § 13-102(2) (1982).

7. "Where one part of culture changes first through some discovery or invention, and occasions changes in some part of culture dependent upon it, there frequently is a delay. . . . The extent of this lag will vary . . . but may exist for . . . years, during which time there may be said to be a maladjustment." Note, The Constitutionality of Mandatory Genetic Screening Statutes, 31 CASE W. RES. L. REV. 897, 901 n.28 (1981) (quoting W. OGBURN, SOCIAL CHANGE WITH RESPECT TO CULTURE AND ORIGINAL NATURE 201 (1922)).
a woman's use of an oral contraceptive product was alleged to have caused the mongoloid condition of the woman's subsequently conceived and born twin daughters. Similarly it was recently reported that litigation was being readied on a claim against an employer whose male employees' exposure to defoliant chemicals caused hip defects in the employees' offspring. Finally, certain criminal incest laws prohibit sexual conduct between certain prospective parents on the sole ground that their offspring are likely to be born with congenital malformations. Non-parental acts can also trigger the potentiality of handicaps for those as yet conceived. Thus, in Renslow v. Mennonite Hospital, a hospital and its director of laboratories were alleged to have caused permanent damage to the brain and the central nervous system of a newborn by negligently transfusing the newborn's mother with incompatible blood nine years earlier. In Bergstreser v. Mitchell, a hospital and its physicians were alleged to have caused brain damage to a newborn as the result of a negligently performed caesarean section on its mother during a pregnancy approximately two and a half years earlier.

During pregnancy, the potentiality of handicaps may be triggered by a variety of acts by any number of differing actors. In hundreds of lawsuits filed during the last decade, a mother's ingestion of

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8. 483 F.2d 237 (10th Cir. 1973).
9. Id. at 238, 240 n.3.
11. See, e.g., ILL. ANN. STAT. ch. 38, § 11-10 (Smith-Hurd 1979) (defining aggravated incest as "sexual intercourse" between any male and his "blood daughter" or between any female and her "blood son", regardless of age). Thus prosecutions can occur in Illinois even when the daughter or son is "sufficiently mature and autonomous to be free from undue parental pressure to submit to sexual advances." Id. (committee comments). In such prosecutions, biological risks to the potential offspring serve as the only legitimate state interest. Id. § 11-11 (committee comments) (noting the biological risks); Developments in the Law, The Constitution and The Family, 93 HARV. L. REV. 1156, 1268-69 (1980) (indicating the impropriety of basing incest laws on the desire to promote tradition).

13. Id. at 349-50, 367 N.E.2d at 1251.
14. 577 F.2d 22, 24 (8th Cir. 1978).
15. Id. at 24.
a prescription drug known as diethylstilbestrol (DES) during pregnancy was alleged to have caused birth defects in later-born children. Similarly, suits involving birth defects caused by the earlier negligence of an automobile driver involved in an accident with a pregnant woman are now commonplace. Other pregnancy stage acts that have been linked in litigation to birth defects include irradiation, exposure to lead, and heroin addiction.

During the birthing process, a variety of acts can trigger the potentiality of handicaps at birth, though the possible actors are typically limited to those medical personnel responsible for facilitating delivery. In Libby v. Conway, damages were awarded for serious brain damage to a newborn resulting when the attending physician, nurses, and anesthetist negligently pushed with considerable force on the mother's stomach during delivery. In Larrabee v. United States, a physician was held liable for a newborn's blindness resulting from a negligent use of forceps in delivery. Similarly, in Norland v. Washington General Hospital, an obstetrician was found responsible for causing quadriplegia by applying excessive force in effecting emergence of the head during a breech delivery.

Legal developments demonstrating an awareness of scientific and medical advances in the understanding of human handicaps at birth extend beyond circumstances wherein defendants are charged with triggering the potentiality of human handicaps prior to birth. These developments embody responses to advances in the capability of predicting handicaps. For example, these advances have prompted discussions in recent years regarding significant extensions of the legal duty to convey certain correct information to a prospec-

22. Id. at 869-70, 13 Cal. Rptr. at 833.
24. Id. at 614, 617.
25. 461 F.2d 694 (8th Cir. 1972).
26. Id. at 696, 699.
tive parent or parents, relating to them the probability that their future offspring may be born with physical or mental handicaps. The court in *Turpin v. Sortini* held that this duty would most often be owed by those possessing no responsibility for any possible handicaps. The duty to inform encompasses situations in which the prospective parent or parents seek information and counsel, and their request is followed by such acts as a negligent misrepresentation, an omission of fact, or fraud. This duty can arise either before or after conception. Of course, although the duty is imposed primarily to promote informed decisionmaking regarding childbearing, breach of the duty often leads to the birth of a handicapped newborn who otherwise would not have been born. Thus, increased recog-

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27. This information can be used in a number of settings, for example, during determinations on whether to bear or beget children and during determinations on whether medical treatment should be sought for children prior to their birth. *Turpin v. Sortini*, 643 P.2d 954, 961 n.8, 182 Cal. Rptr. 337, 344 n.8 (1982). This information can be directly related, as well, to the chances for handicaps or simply be information by which the chances for handicaps can be learned. *Compare* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (prior to conceiving a second child, the parents were incorrectly informed that their first child's disease did not result in increased chances that a subsequent baby would be similarly diseased) with *Turpin v. Sortini*, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (prior to conceiving a second child, parents were incorrectly informed that their first child did not have a hereditary ailment impairing her hearing).


31. Does one prospective parent have a duty to be truthful to another prospective parent about his or her genetic load or other deficiencies likely to result in handicapped offspring? Consider the recent suit by a disgruntled lover involving deception regarding the partner's affliction with herpes. Chicago Sun-Times, Mar. 6, 1983, at 3, col. 1; Will, *New Law of Sexual Responsibility*? id., Feb. 25, 1983, at 35, col. 1. See also *Piper v. Hoard*, 107 N.Y. 73, 13 N.E. 626 (1887) (male fraudulently represented to female prior to their marriage his ownership of land and its availability to any subsequently born child).


33. Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981) (after performing unsuccessful abortion on woman who feared having her third child with inherited disease, gynecologist persistently assured woman she was not pregnant; the result was the premature birth of a child with neurofibromatosis); Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982) (after testing the father, doctor erroneously assured parents that their preivable fetus would not be afflicted with Tay-Sachs disease).

34. Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (failure to advise pregnant woman of increased risk of Down's Syndrome and the availability of amniocentesis led to decision to bear child); *Turpin*, 643 P.2d at 954, 182 Cal. Rptr. at 337 (failure to advise parents that their first child was 'stone deaf' led to the conception and birth of a second child); Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982) (erroneous Tay-Sachs report on father led mother to decide to continue pregnancy and bear a child). While duty and breach of duty often are easily established, the meas-
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nition of and respect for a duty to inform would inevitably lead to fewer handicapped newborns. This may be said to constitute a second form of handicap prevention.35

While the foregoing review illustrates the manner in which the law has adapted to increased understanding of birth defects, it is by no means exhaustive.36 More importantly, many scientific and medical developments have as yet neither influenced legal standards, nor sufficiently matured to the point that legal change would be appropriate. Undoubtedly, during the next few years there will be further influence and further maturation. Why then is there the concern with future legal reaction to any increased scientific and medical understanding, since one could suggest that, to date, the "maladjustment" caused by the time lag between medical-scientific advances and the law has not been unusual.37 The answer is simple and lies in the prospect of unprecedented harm that could have been prevented had the law reacted more swiftly. To date, lawmakers generally have left for another day difficult questions regarding claims such as those involving genetic damages done to successive generations of people as a result of a nuclear accident, or perpetual claims arising from a chemical accident or long-term radiation exposure.38 While lawmakers, in conjunction with scientists and others, certainly are

ure of damages to prospective parents remains quite controversial. Wilczynski v. Goodman, 73 Ill. App. 3d 51, 58-63, 391 N.E.2d 479, 485-88 (1979) (reviewing recent cases), as do the questions of whether the handicapped newborn possesses her own cause of action, Turpin, 643 P.2d at 957-61, 182 Cal. Rptr. at 340-44 (reviewing recent cases), and the nature of the newborn's damage recovery should a duty to the newborn also be deemed breached, Turpin, 643 P.2d at 961-66, 182 Cal. Rptr. at 344-49 (reviewing recent cases).

35. Just how far the right to decide about childbearing extends is not yet known, and so also unknown is the breadth of information regarding childbearing which must be conveyed to prospective parents. Note, Sex Selection Abortion: A Constitutional Analysis of the Abortion Liberty and a Person's Right to Know, 56 IND. L.J. 281 (1981) (suggesting that a woman does not have the right to abort for whatever reason she alone chooses, that a state could prohibit sex selection amniocentesis, and that a state could thus prevent a woman from discovering the sex of the fetus she carries).


37. Note, supra note 7.

38. Renslow, 67 Ill. 2d at 358, 367 N.E.2d at 1255.
not competent to foreclose all future harm, clearly more can now be done.

III. CONTEMPORARY LAWS ON PREVENTING HANDICAPS TO NEWBORNS

To date, laws promoting the prevention of handicaps to newborns have been indirect in that their central purpose usually rests upon such other, albeit legitimate, grounds such as compensation for and deterrence of socially undesirable conduct. Often, these grounds are promoted in tort and criminal law. Thus, where a preventable handicap is not avoided due to the negligence of a physician, compensation can be recovered in a tort action for the resulting handicap. Where a physical condition suggesting a potential handicap is not eliminated due to the negligence of a physician, again, compensation under tort law is available for the resulting handicap. Finally, criminal sanctions are often imposed on those whose conduct causes a newborn to be afflicted with either mental or physical handicaps, although the affliction is not a requisite for the imposition of sanctions.

As well, laws promoting the avoidance and elimination of handicaps to newborns have been incoherent and only occasionally further such underlying purposes as compensation and deterrence. For example, where a preventable handicap is not avoided or eliminated due to negligence, compensation may only be forthcoming if the negligent act occurred after conception. In addition, preconception or pre-birth conduct resulting in a newborn’s handicap may not be subject to criminal sanction, despite the fact that similar conduct involving a born person would trigger possible criminal

39. The legal parameters of such compensation are often unclear. See supra note 34.

40. Renslow, 67 Ill. 2d at 350, 357, 367 N.E.2d at 1251, 1255 (in part, defendant responsible for not notifying woman that she had been administered incompatible blood which could result in handicaps to future offspring, where the court referred to scientific techniques which can mitigate or alleviate a child’s prenatal harm); Turpin. 643 P.2d at 961 n.8, 182 Cal. Rptr. at 344 n.8.

41. See, e.g., Reyes v. Superior Court, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977) (heroin use during last two months of pregnancy, despite public health nurse’s warning, led to twin boys’ heroin addiction and to a finding that the felony child endangering statute was not violated).

42. Albala v. City of New York, 54 N.Y.2d 269. 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981) (tort committed against the mother of a child not yet conceived does not give rise to a cause of action in favor of the child even if that tort caused injury to the child during gestation, resulting in the child’s being born with a damaged brain).
Prevention of handicaps to newborns could easily be more fully promoted by making compensation and deterrence laws more direct and more coherent. Tort law should generally recognize, for example, a duty to prevent handicaps owed to the unborn by those having contact with the prospective parent or parents. Thus, where a physician's treatment of a woman results in her giving birth to a child with a preventable handicap, it should be found that the physician breached a duty owed to the newborn—regardless of any duty owed or breached to the woman. Similarly, criminal law should recognize more often than it does now, for example, that one not yet born can be the victim of crime. Thus, an assault causing only minor injury to a pregnant woman but resulting in the death of her fetus, should be prosecutable as a form of homicide.

Even if laws aimed at compensation and deterrence were more comprehensive, they would still generally operate only after the onset of handicaps, when the link between individual conduct and resulting handicaps could be clearly established within a reasonable period of time. These laws are not used: (1) To secure equitable relief prior to the onset of handicaps;\(^43\) (2) to address non-individualized conduct such as industry-wide practices of various corporations within an enterprise where no single entity can be proven responsible for particular handicaps;\(^45\) (3) to cover conduct which is somewhat far removed in time, but not in actual causal link, from handicaps;\(^46\) or (4) to encompass activity which may lead to signifi-

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44. Among other problems, a particular couple may be unable to foresee that certain conduct will lead to the onset of handicaps for their future offspring, though governmental officials could foresee that a certain number of handicaps would occur if such conduct generally continued. As well, even if the onset of particular handicaps was foreseeable, equitable relief may be barred for there are not facts supporting irreparable harm or the legal remedies available subsequent to the onset of handicaps might be deemed adequate. Atchison, Topeka and Santa Fe Ry. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981) (traditional equitable requirements only unnecessary in a suit to enjoin prohibited conduct where statute expressly establishes lesser requirements).


46. The problem of defending stale claims may render inapplicable laws otherwise relevant. Renslow, 67 Ill. 2d at 358, 369-70, 372, 367 N.E.2d at 1255, 1261, 1262.
cant handicaps for many, but which is not definitively linked by scientists to the onset of such handicaps. It can thus be said that laws promoting the avoidance and elimination of handicaps to newborns are inadequate and that legal change beyond the bounds of tort and criminal law is in order.

Recently, some encouraging signs have emerged, indicating that lawmakers recognize existing compensation and deterrence-based rules as an inadequate means of promoting the prevention of handicaps to newborns. As further scientific and medical advances are made regarding the prevention of handicaps, early legal developments in the creation of a legal duty to prevent handicaps will provide a foundation upon which future laws can be fashioned.

One such early development was the creation of the Maryland Commission on Hereditary Disorders. This creation was prompted by legislative findings that "hereditary disorders are often costly and tragic and sometimes deadly burdens to the health and well-being of the citizens" and that detection through screening, as well as increased medical knowledge, of hereditary disorders may lead to their alleviation or cure. In view of such findings, the Commission was delegated the authority "to adopt rules, regulations, and standards for the detection and management of hereditary disorders." The need for such a delegation was based on the further legislative finding that "legislation designed to alleviate the problems associated with specific hereditary disorders may tend to be inflexible in the face of rapidly expanding medical knowledge."

The Maryland Commission's ability to promote the prevention of handicaps caused by hereditary disorders is limited in several major ways. First, individual participation in a hereditary disorder program should always be "wholly voluntary." Second, a hereditary disorder program can never "require restriction of childbearing" or "be a prerequisite for eligibility for any service or other

47. For a recent review of scientific evidence and scientific speculation regarding the fetally toxic work environment, see Furnish, Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964, 66 IOWA L. REV. 63, 119-29 (1980).
49. Id. § 13-102(2).
50. Id. §§ 13-102(3i), 13-102(3ii).
51. Id. § 13-109(a).
52. Id. § 13-102(8).
53. Id. §§ 13-102(10), 13-109(f)(1).
54. Id. § 13-109(f)(2).
Finally, individual participants in a screening program for a hereditary disorder are subject only to nondirective counseling so that counselors simply provide the information needed for their clients to make decisions and avoid influencing those decisions.

Generally, when states have sought legislatively to prevent handicaps in newborns caused by nonhereditary factors, a similar voluntary, noncoercive, and nondirective approach is taken. In addition to the enactment of a Hereditary Disorders Act quite comparable to that of Maryland, the California legislature sought to prevent other forms of birth handicaps with a similar approach. For example, the California State Department of Health Services is authorized to "conduct a statewide program for providing nutritional food supplements to low-income pregnant women." This authorization was based upon a legislative finding that "evidence increasingly points to adequate nutrition as a determinant not only of good physical health but also of full intellectual development and educational achievement, with adequate nutrition in the earliest months and years being particularly important." The same department has also been mandated to "maintain a program for the prevention of blindness."

Federal legislative and regulatory policy is also patterned on a voluntary, noncoercive, and nondirective approach. For example, federal enactments provide financial assistance to states for several purposes: (1) To assure certain mothers and children "access to quality maternal and child health services"; (2) to reduce the "incidence of preventable diseases and handicapping conditions among children. . . ."; and (3) to develop "counseling and testing programs and other programs for the diagnosis, control, and treatment of genetic diseases." States receiving such assistance generally cannot compel participation in programs supported by federal funding.
However encouraging one finds the recent advances toward further research, counseling, and testing on preventable handicaps, and however laudable one finds recent advances in the compensation and deterrence-based rules promoting handicap prevention, lawmakers must begin to consider more direct, coherent, and comprehensive laws promoting the avoidance and elimination of handicaps to newborns. Certain laws can be implemented today because of recently-developed scientific and medical understanding. Although other laws must await further developments, they must presently be discussed in the abstract so that when a proper understanding is achieved, the time lag or period of "maladjustment" will be as brief as possible.

IV. DIRECT, COHERENT AND ADEQUATE LAWS ON PREVENTING HANDICAPS TO NEWBORNS

A. Direct Laws

Laws promoting the prevention of handicaps to newborns are often indirect, in that one of their central aims is not maintenance of a duty to the newborn to prevent handicaps. Instead, the laws focus on the maintenance of a duty to undertake reasonable conduct toward others. Both tort and criminal laws reflect this indirect tack, and cases involving their implementation demonstrate that the laws often fail to promote prevention of handicaps to newborns without justification.

An apt illustration in tort law is found in the 1977 Illinois Supreme Court decision in *Renslow v. Mennonite Hospital.* The case involved allegations that a hospital and its director of laboratories had on two occasions negligently transfused a thirteen year old girl with Rh-positive blood, which was incompatible with and which...
sensitized her Rh-negative blood. Further, the case involved allegations that defendants discovered that they had administered the incompatible blood, but at no time had notified the girl's mother or family. The girl first learned that her blood had been sensitized over eight years later, when a routine blood screening was ordered by a physician in the course of prenatal care. A short time later she learned of the sensitization and allegedly, as the result of such sensitization, she delivered a child that was jaundiced and suffering from hyperbilirubinemia. It was alleged that the child had suffered permanent brain and nervous system damage as the result of defendants' acts. The Supreme Court of Illinois found that the child stated a cause of action against defendants, finding them potentially liable to a person whose existence was not apparent at the time of the acts.

The court's finding that the child possessed a cause of action promoted the prevention of handicaps indirectly rather than directly. Stated as part of the court's holding was the fact that the child has "a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother." Of course, the recognition of a duty to the mother is based on the policy that one who acts unreasonably to a living patient in providing medical services should compensate the patient for unreasonable acts. The court did not find a duty owed to the child, regardless of any duty owed to its mother. Had it been recognized by the court, this independent duty would have been direct, based on the policy that in certain situations a duty to act so as to prevent handicaps at birth is owed to the unborn.

An illustration of indirect reasoning in criminal law is the series of state supreme court cases disallowing prosecutions for the intentional murder of a fertilized, implanted fetus where the criminal de-
fendant was not involved in a consensual abortion. In each of the cases, the court held that the fetus was not a person within the meaning of the state's homicide statute. Although the defendant could still be prosecuted for various crimes involving the pregnant woman as the victim, these prosecutions would only indirectly promote the prevention of handicaps to newborns. The strength of this promotion would be lessened because the harm to the prospective mother is often far less serious than the harm to her fetus. Thus, these indirect prosecutions—if initiated—would encompass crimes such as abortion, assault, and battery; crimes that carry less severe penalties than does homicide.

A partial explanation of the indirect nature of laws promoting handicap prevention may lie in a misunderstanding of the Supreme Court of the United States' decisions in Roe v. Wade, which addresses the legal status of the unborn. One California appellate court affirmed the dismissal of a homicide prosecution of a defend-

73. People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980); State v. Brown, 378 So. 2d 916 (La. 1979); State v. Anderson, 135 N.J. Super. 423, 343 A.2d 505 (Law Div. 1975); State v. Larsen, 578 P.2d 1280 (Utah 1978). See also People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775 (1980) (dismissing a charge of negligent homicide where the victim was a fetus “ready for birth,” while calling the born-alive rule “archaic”). But see Iowa Code Ann. § 707.7 (West 1979) (noting feticide involves the intentional termination of a human pregnancy after the second trimester); N.Y. Penal Law § 125.00 (McKinney 1975) (defining homicide as including death of an unborn child of more than twenty-four weeks); R.I. Gen. Laws § 11-23-5 (1981) (willful killing of an unborn quick child in certain circumstances is manslaughter). See also Cal. Penal Code § 270 (West Supp. 1982) (a parent's failure to provide necessities for a minor child is a misdemeanor, and a “child conceived but not yet born is to be deemed an existing person”).

74. People v. Greer, 79 Ill. 2d 103, 116, 402 N.E.2d 203, 209 (1980); State v. Brown, 378 So. 2d 916, 918 (La. 1979); State v. Anderson, 135 N.J. Super. 423, 429, 343 A.2d 505, 509 (Law Div. 1975) (fetuses found to be victims of murder for they were born alive and then died); State v. Larsen, 578 P.2d 1280, 1282 (Utah 1978).

75. For a review of available Louisiana criminal law after State v. Brown, 378 So. 2d 916 (La. 1979), see Parness & Pritchard, To Be Or Not To Be: Protecting the Unborn's Potentiality of Life, 51 U. Cin. L. Rev. 257, 269-70 (1982). Even where state criminal laws appear direct in that fetuses are potential victims of homicidal acts, punishment for killing a fetus is often far less severe than punishment for killing a person born alive; nonviable fetuses may not be included as victims of crime—even where the actor is not the mother; and the legislative goal may not have been the protection of the fetus' potentiality for life. N.Y. Penal Law § 70.00, 125.45 (McKinney 1975 & Supp. 1982-1983) (acts causing miscarriage in third trimester prompt a maximum sentence of only seven years in prison); Note, The Law and the Unborn Child: The Legal and Logical Inconsistencies, 46 Notre Dame Law. 349, 364 (1971); Roe v. Wade, 410 U.S. 113, 150-52 (1973) (each noting uncertainty regarding original purpose of early abortion statutes—protection of the mother or the child).

76. 410 U.S. 113 (1973) (declaring the Texas statutory scheme regulating abortion to be unconstitutional because of its restrictions on women's constitutionally protected right to privacy).
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ant who had allegedly killed a previable human fetus although the
criminal statute defined homicide as "the unlawful killing of a
human being, or a fetus." The court failed to implement the stat-
ute because of its reading of Roe:

The underlying rationale of Wade, therefore, is that until viability
is reached, human life in the legal sense has not come into exist-
ence. Implicit in Wade is the conclusion that as a matter of constitu-
tional law the destruction of a non-viable fetus is not the taking
of human life. It follows that such destruction cannot constitute
murder or other form of homicide, whether committed by a
mother, a father (as here), or a third person.

The California court clearly misread Roe. In Roe, the Supreme
Court held only that a previable fetus was not a "person" enjoying
fourteenth amendment protection and specifically refused to re-
solve the difficult question of when life begins. In fact, the high
court noted that while they are treated differently under the law than
living persons, the unborn have been accorded certain legal rights.
In a later case involving the term "dependent child," which is found
in the Aid to Families with Dependent Children (AFDC) program
of the Social Security Act, the high court determined whether the
term encompassed the unborn without even referring to its treatment
of the unborn in Roe.

Is there more than a semantic difference between indirect and
direct promotion of handicap prevention in, for example, a Renslow
setting, where a girl was born handicapped as the result of a defend-
ant's preconception negligent conduct toward the girl's mother?
Surely there is, if the mother's contributory negligence causes there

CAL. PENAL CODE § 187 (West 1982 Supp.)).
78. Id. at 757, 129 Cal. Rptr. at 502. For failure to implement wrongful death act
because of misreading of Roe, see Toth v. Goree, 65 Mich. App. 296, 300, 237 N.W.2d
297, 301 (1975); Wallace v. Wallace, 120 N.H. 675, 678, 421 A.2d 134, 137 (1980).
79. 410 U.S. at 156-57.
80. Id. at 159 ("[w]hen those trained in the respective disciplines of medicine, phi-
losophy and theology are unable to arrive at any consensus, the judiciary, at this point in
the development of man's knowledge, is not in a position to speculate as to the answer.").
81. Id. at 161 ("the law has been reluctant . . . to accord legal rights to the unborn
except in narrowly defined situations and except when the rights are contingent upon live
birth").
83. Burns v. Alcala, 420 U.S. 575 (1975). The determination was based on inquir-
ies into the legislative language, the legislative history, and the administrative practice
pursuant to the legislation. Id. at 578-79, 581-82, 584-86.
to be no breach of duty to the girl. Similarly, damages might differ if there were two distinct duties, one owing to the mother and another to the girl. Moreover, a duty to prevent handicaps could be assessed against the mother in the girl's favor in a more direct setting. Finally, application of the crucial "foreseeability" criterion might differ, as the foreseeability of someone being harmed by the negligent performance of medical services on behalf of another differs from the foreseeability of someone other than a living person who is the recipient of medical services. This final difference is not without significance outside the realm of tort law.

In part, the contemporary failure to recognize the duty to prevent handicaps might originate from the general discomfort that exists with regard to many of the issues implicit in discussions of such a duty. To what extent do prospective parents have a duty to their

84. Supra note 72. See also Fallaw v. Hobbs, 113 Ga. App. 181, 184-85, 147 S.E.2d 517, 520 (1966) (pregnant woman's negligence is not imputable to her child who sues a second tortfeasor for injuries caused while inutero based on a Georgia statute which states that parental fault is not imputable to the child). See also City of Louisville v. Stuckenborg, 438 S.W.2d 94, 97 (Ky. 1969) (contributory negligence of pregnant woman leading to her child's death shortly after birth not imputable to her husband who sues under a wrongful death act for the loss of his child).

85. For example, differences would arise in a comparative negligence jurisdiction where the negligence of the mother might be imputed to the girl if no independent duty to the girl is established. Fallaw v. Hobbs, 113 Ga. App. 181, 184-85, 147 S.E.2d 517, 520 (1966). As well, differing damages might reasonably flow or be foreseeable from a doctor's breach of a duty to provide reasonable health care to a girl or woman who is a potential mother than from a doctor's breach of a duty to undertake reasonable conduct toward the potential offspring of a female patient. To date, the breach of the duty owed to a mother has often led to recovery by an afterborn child for the child's birth with disabilities caused by prenatal injuries, with no discussion of any distinct duty to the mother's unborn child. 67 Ill. 2d at 358, 367 N.E.2d at 1255. But see Hughson v. St. Francis Hosp. of Port Jervis, 9 FAM. L. REP. (BNA) 2351 (N.Y. App. Div. Mar. 9, 1983). Compare Hughes v. Hutt, 455 A.2d 623 (Pa. 1983) (woman's deception regarding her use of birth control held not to be a defense to an afterborn child's paternity suit).

86. If distinct duties were found owed by the defendant to both the mother and the girl, then later establishment of some duty (presumably within federal constitutional limits regarding childbearing and childrearing) owed the girl from her mother would be easier (presumably after the elimination of a parental immunity barrier). For some thoughts on a potential parent's duty to future offspring, see Dinsdale, Child v. Parent: A Viable New Tort of Wrongful Life?, 24 ARIZ. L. REV. 391 (1982); Robertson, supra note 66, at 1413; Comment, Parental Liability for Prenatal Injury, 14 COLUM. J.L & SOC. PROBS. 47 (1978) [hereinafter cited as Parental Liability]; Comment, Preconception Negligence: Reconciling an Emerging Tort, 67 GEO. L.J. 1239, 1260-61 (1979) [hereinafter cited as Preconception Negligence].

87. Consider the law regarding third party beneficiaries to contracts. Comment, Third Party Beneficiaries and the Restatement (Second) of Contracts, 67 CORNELL L. REV. 880 (1982).
unborn children?\footnote{88} When should the law presume that prospective parents' decisions are consistent with their future offspring's best interests?\footnote{89} To what extent can the state intrude upon living persons' decisions which will, or may, have negative impact on the unborn?\footnote{90} When, if ever, should the laws recognize certain potential persons' interests in not being born due to the prospect of severe handicaps?\footnote{91}

\footnote{88}{See King, The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn, 77 Mich. L. Rev. 1647, 1678, 1682-83 (1979) (suggesting maternal responsibility can only be fully assessed after fetal viability); Comment, Parental Liability, supra note 86, at 85-87 (suggesting a "reasonably prudent expecting parent standard," which is to be maintained only after the parents were aware or had reason to be aware of the pregnancy—even if awareness predated the fetus' viability); Comment; Preconception Negligence, supra note 86, at 1260-61 (suggesting recognition of claims by children against their parents for prenatal or preconception negligence would be desirable, but that such recognition awaits substantial statutory or common law development).}

\footnote{89}{With respect to children who are born, it has been strongly urged that the presumption of consistency be maintained unless there appears a substantial risk that the child will imminently suffer a physical harm that will cause serious injury. See Comment. Constitutional Limitations on State Intervention in Prenatal Care, 67 Va. L. Rev. 1051, 1062-64 (1981). \textit{But see} Parham v. J.R., 442 U.S. 584, 604 (1974) (no absolute parental right to institutionalize a living child). Regarding unborn children, the risk of physical harm standard may not be relevant to prospective parents' decisions regarding their future offspring. Constitutional Limitations on State Intervention in Parental Care, 67 Va. L. Rev. 1051, 1064-67 (1982) (suggesting a balancing-of-interests approach is necessary to assure no undue state interference with the various privacy rights involved in prenatal health care). See also Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (finding natural father of an illegitimate child need not be given the same authority to block an adoption by a stepfather as the law gives a divorced father because the natural father was assumed to have never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child); Justus v. Atchison, 19 Cal. 3d 564, 581, 565 P.2d 122, 133, 139 Cal. Rptr. 97, 108 (1977) (distinguishing between harm to parents caused by death of a born child and by death of a fetus).}

\footnote{90}{There is precedent for state intrusion when pregnant women's desires about health care run contrary to both their own and their fetus' interests. \textit{See, e.g.}, Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981) (medical procedures ordered for pregnant woman over her religious objections in a situation where there was a 99-100% chance of fetal death and 50% chance of maternal death without them, and nearly a 100% chance that both would survive with them); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, \textit{cert. denied}, 377 U.S. 985 (1964) (over religious objections, viable fetus' and mother's lives would be saved by order of blood transfusions). Yet, to date, states have done far less to protect the unborn when maternal health is not an issue and where there are not life-threatening circumstances facing the unborn. \textit{See, e.g.}, Baby X. v. Misiano, 373 Mass. 265, 366 N.E.2d 755 (1977) (father's duty to support child did not encompass an unborn fetus); In re Dittrick Infant, 80 Mich. App. 219, 263 N.W.2d 37 (1977) (Probate Code not read to grant the unborn the protections of child custody laws, though amendments to the Code allowing such a reading were desirable).}

Notwithstanding the discomfort with many of the relevant issues, the time is ripe to explore the means by which laws can more directly prevent handicaps to newborns. Little discomfort should be felt in implementing many necessary changes. For example, it should be easy to recognize in both tort and criminal law a duty to undertake reasonable conduct toward unborn who are clearly foreseeable to the actor and whose interests are not in conflict with the interests of any others touched by the actor. Thus, one who counsels or medically treats a woman who is seeking to bear a normal and healthy child should owe a duty both to the woman and her unborn offspring. The scenario is not much different from a new mother seeking a well baby checkup for her newborn. By this standard one who intentionally assaults a visibly pregnant woman without her consent should be deemed to be acting criminally against both the woman and her fetus.

Somewhat more discomfort is felt with other possible changes. For example, if a duty to undertake reasonable conduct toward the unborn be recognized in tort law, then should that duty encompass those who cannot clearly foresee the unborn, or those who have conflicting responsibilities to one or both of the unborn's potential parents? And, if such a duty is at times recognized, where should rational distinctions be drawn between instances where there is and is not a duty? Further, how far should the courts go in drawing such distinctions before the legislature is called upon to continue the task of line drawing? Finally, to what extent may proof of fault in tort litigation be unnecessary where claimants seek compensation for

imposition of parental duty to abort is unwarranted and suggestive of Orwellian genetics).

92. Because of the presumption that parents act in their offspring's best interests, a conflict between duty to parent and child might only arise if the parent were abusive or neglectful. Parham v. J.R., 442 U.S. 584, 602-03 (1979).


94. Consider an employer who has a duty not to engage in sex discrimination, but who operates a facility posing health dangers only to the future offspring of female employees. For a suggested solution to this tension between prospective mothers and their offspring, see Furnish, supra note 47, at 115.

95. Renslow, 67 III. 2d at 357, 367 N.E.2d at 1255.

96. Jorgensen, 483 F.2d at 240-41.
handicaps resulting from defendants' prenatal acts?97

In criminal law similar issues give rise to heightened discomfort. Should it be a crime against the fetus for one to harm unintentionally a visibly pregnant woman’s fetus, with or without maternal consent?98 And, should it be a crime against the unborn to trigger the potentiality of handicaps at birth, perhaps where subsequent birth and even conception is uncertain and where the prospective parent or parents accede to the triggering acts?99 Finally, to what extent should prospective parents be made responsible under criminal law for conduct which does, or may, lead to birth handicaps of their offspring?100

In discussing these more discomforting issues, a recognition of the need for intricate linedrawing must be maintained. In tort law, the “specter of successive generations of plaintiffs complaining against a single defendant for harm caused by genetic damage done an ancestor in a nuclear accident,” or of “perpetual claims arising from chemical accident or long-term radiation exposure,” may be troublesome to many who are sympathetic to the unborn 0 I and may require intricate linedrawing. Equally troubling are questions regarding the extent to which a prospective parent or parents can be made defendants in tort actions initiated on behalf of their offspring102 and regarding prenatal parental conduct.103 The partial or complete abrogation of parental immunity in suits by children involving postnatal conduct suggests that state policy often supports initiation of suits based on prenatal conduct.104

97. Id. at 241 (father whose twin daughters’ Mongoloidism was caused by the defendant’s oral contraceptive product had strict liability claim under Oklahoma law).
98. Consider, for example, the serious harm resulting from a pregnant woman’s participation in a touch football game—or perhaps her being struck by an errant football as she strolled in the park. If the foregoing prompts a quick and simple negative response, does such a response continue if one assumes some negligent—or grossly negligent—conduct?
99. Consider, for example, the possible criminal liability for the harm caused by an employer’s maintenance of a toxic workplace. See Furnish, supra note 47.
100. For a possible case, see Parness & Pritchard, supra note 75, at 297.
101. Renslow, 67 Ill. 2d at 357, 367 N.E.2d at 1255.
102. For a review of the practical difficulties with such suits, see Comment, Parental Liability, supra note 86, at 88-89.
103. One author has concluded gross negligence is the point at which a woman’s right to control freely her own body should be subordinated to the unborn child’s right to begin life with a sound mind and body. Note, Recovery for Prenatal Injuries: The Right of a Child Against Its Mother, 10 Suffolk U.L. Rev. 582, 609 (1976). See also supra note 88.
104. After reviewing the erosion of the parent-child tort immunity doctrine, one author concluded:
In criminal laws under which the unborn can be victims the issue is the criminal's familiarity with the existence of a fetus or with the potentiality for parenthood of one with whom the criminal deals. It may be unfair to charge with crimes all those who cause physical or mental handicaps to newborns, even where their action is socially undesirable. For example, it may be unreasonable to charge with assault one who causes severe physical or mental handicaps to a newborn whose pregnant mother was involved in otherwise non-criminal "horseplay" with the would-be defendant, at least where neither the would-be defendant nor the mother knew during their play of the pregnancy. Thus, as in tort law, linedrawing in criminal law is necessary. Just as in tort law, problems regarding prenatal parental conduct subject to criminal sanction arise in crimes against the unborn, though precedent for parental culpability exists in some states.

As compared with state laws involving children born alive, laws involving prenatal conduct by possible parents seemingly trigger not only differing perspectives of reasonable parental conduct or legitimate exclusive areas of parental authority and discretion, but also

Thus, over the past fifteen years an increasing number of state courts have abrogated, either partially or entirely, the parental immunity doctrine. Given this growing recognition of parental liability for negligent injury to minor children and the universally recognized liability of third parties for prenatal injury, an action by the child against its parents for negligent prenatal injury seems to be both logically consistent with current trends in the law and just. In the absence of other prevailing considerations, it appears that the child's cause of action should lie.


Of course, liability in tort can extend far beyond liability in criminal law in an effort to deter, as well as compensate for, socially undesirable conduct. Both federal constitutional protections and legitimate state policy considerations support a finding of unfairness in criminal law with no corresponding finding in tort law. Consider, for example, the differing treatment afforded slightly negligent acts by criminal and tort law (is the eighth amendment relevant?).

CAL. PENAL CODE § 270 (West Supp. 1982) (parental failure to provide necessities to a minor child is a misdemeanor, and a "child conceived but not yet born is to be deemed an existing person"); IOWA CODE ANN. § 707.7 (West 1979) ("any person" who intentionally terminates or tries to terminate a human pregnancy after the end of the second trimester is guilty of a felony, except where a physician acts to preserve the life of the pregnant woman); N.Y. PENAL LAW §§ 125.50, 125.55 (McKinney 1975) (self-abortion in two degrees, wherein only one requires a resulting miscarriage but wherein both relate to maternal acts and are deemed misdemeanors).

While some states abrogating parental tort immunity have adopted only a reasonable parent standard, others have retained immunity for acts involving certain exercises of parental authority and discretion. Compare Gibson v. Gibson, 3 Cal. 3d 914,
differing federal constitutional concerns regarding childrearing. Parental childrearing interests rather than childbearing interests seem implicated, for in most tort and criminal law settings the prospective parents' acts come only after a determination has been made to bear a child. Where prospective parents' acts precede any determination to bear or beget, the acts are also typically unrelated to the decision to bear or beget and, at most, relate to decisions regarding childrearing. For example, a woman who takes heroin, knowing herself to be pregnant and to be desirous of bearing a child, could be deemed to have undertaken both the tortious and criminal conduct toward her unborn child. As well, a male with recognized childbearing potential, who consistently enters a workplace where significant exposure to vinyl chloride or lead is assured, could be deemed to have undertaken both tortious and criminal conduct toward his unborn child.

In conclusion, it can be said that when exploring the means through which laws can more directly prevent handicaps to newborns, constant reminders of several major themes would greatly facilitate the inquiry. An understanding of these themes will assist in the resolution of the less complex issues presented and properly focus attention on the more difficult ones. These themes involve the


108. Regarding parental rights to rear their children, the United States Supreme Court has said: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Commonwealth. 321 U.S. 158, 166 (1943). Yet, parental authority is not absolute. The Court has recognized that the state as parens patriae can act to guard the general interest in youth's well being, and thus can restrict parental decision-making in such matters as school attendance and child labor. Id. See also Parham v. J.R., 442 U.S. 584. 602-03 (1979) ("a state is not without control over parental discretion in dealing with children when their physical or mental health is jeopardized").

109. A pregnant woman's use of heroin seemingly has little to do with her constitutionally protected decision to bear or beget children. 410 U.S. at 153. Yet, her heroin use can cause severe adverse effects for her unborn child's physical or mental health. In re John Children. 61 Misc. 2d 347, 354-56, 306 N.Y.S.2d 797, 806-07 (1969). It would thus be legitimate for the state as parens patriae to act to guard the unborn child's well being. Infra note 116.

110. For example, the exposure of a male of childbearing capacity to repeated and significant doses of certain substances typically has little to do with any childbearing decision; but again, a future child's physical or mental health can be severely impaired. Howard, Hazardous Substances in the Workplace: Implications for the Employment Rights of Women. 129 U. Pa. L. Rev. 798. 803-05 (1981) (such substances may well include lead and vinyl chloride).
legitimacy of state protection of the unborn and state characterizations of the unborn as persons.

First, the state has legitimate interests in preventing handicaps to newborns caused by prenatal conduct, notwithstanding what appears to many as a lack of respect for the unborn in the *Roe* decision. In fact, the *Roe* court expressly recognized this realm of governmental power by indicating that Texas had an "important and legitimate interest in protecting the potentiality of life" and by referring with approval to state laws seeking to improve the unborn's quality of life after birth. The Court has reaffirmed its view on the legitimacy of such power since *Roe* in a case involving alleged welfare benefits for the unborn.

Second, notwithstanding the decision in *Roe*, the unborn can be viewed under many laws as "persons" deserving of certain legal rights and protections. While "the unborn have never been recognized in the law as persons in the whole sense," and will probably never be so viewed, there is much the state can do legitimately to directly promote the unborn's interest in achieving their potentiality for life without any accompanying physical or mental handicaps. In particular, the unborn can be more fully recognized as being "persons" directly affected by both tortious and criminal conduct, and thus as being appropriate plaintiffs in tort litigation and victims in criminal prosecution.

B. *Coherent Laws*

Laws promoting the prevention of handicaps to newborns are sometimes incoherent in that they further such underlying purposes as compensation and deterrence in an unequal way, with random

111. 410 U.S. at 162.
113. Burns, 420 U.S. at 583 (Title V of the Social Security Act explicitly provides for monetary assistance to expectant mothers who are desirous of purchasing adequate medical care for unborn children).
114. 410 U.S. at 162.
115. Parness, *supra* note 112, at 503 (in a clash of values involving protection of potential human life, promotion of individual freedom, and furtherance of the overall quality of life, the unborn's interests will sometimes be undermined).
116. In *Roe*, the Court found the states had an "important and legitimate interest in protecting the potentiality of human life." 410 U.S. at 162. This applies regardless of whether the state's interest was founded on a theory that a new human life is present from the moment of conception. *Id.* at 150.
rather than rational distinctions between what is prevented and who is protected. Again, tort and criminal laws provide examples of such incoherence.

In the area of tort law, compensation is sometimes awarded a newborn and his family for injuries resulting from a defendant's acts prior to the newborn's birth but after its conception, but not for injuries resulting from a defendant's preconception acts.\textsuperscript{117} This distinction seems arbitrary.\textsuperscript{118} Also arbitrary is the distinction made in wrongful death and survival claims between fetuses who incur defendant's harmful conduct and who die therefrom shortly after live birth, and fetuses who incur a defendant's harmful conduct and who are not born alive as a result.\textsuperscript{119} In the latter setting, immediately harmful acts upon a fetus are treated less harshly than acts taking longer to produce the ultimate harm.\textsuperscript{120}

In criminal law, as noted earlier, the unborn often go unnoticed.


\textsuperscript{118} In drawing the distinction between preconception and postconception acts preceding birth, one court expressed concern that nonartificial and nonarbitrary lines could not be rationally drawn by the courts between certain preconception acts and others—though it hinted that the legislature might be capable of such line-drawing. Albala v. City of New York, 54 N.Y.2d 269, 273, 429 N.E.2d 786, 788, 445 N.Y.S.2d 108, 110 (1981). Such an expression fails to legitimize, however, judicial distinctions between preconception and postconception acts prior to birth. Similarly "staggering implications" and "unlimited hypotheses" accompany the necessary distinctions between certain postconception but prebirth acts and others. \textit{Id.} at 273, 429 N.E.2d at 788, 445 N.Y.S.2d at 110. As well, the court was concerned over the impact of encouraging "defensive medicine." \textit{Id.} at 274, 429 N.E.2d at 788, 445 N.Y.S.2d at 110. Yet, whatever it meant by "defensive medicine," the case was an easy one for it concerned preconception acts that were not only harmful to the later-born child, but also were negligent and harmful to the child's mother. \textit{Id.} at 271, 429 N.E.2d at 787, 445 N.Y.S.2d at 109. Thus, the case did not involve a scenario wherein the duty owed to the woman conflicted in any way with any duty found to be owing to her potential offspring.

\textsuperscript{119} For a defense of this born alive rule, both where the death is and is not directly caused by the tortfeasor, see Robertson, \textit{supra} note 72, at 1420-34. Yet, it seems that compensation even where no live birth followed would not be a "windfall"; would help compensate parents, at the least, for "sentimental loss"; and could be reconciled with Roe, in that the tortfeasor's acts (unlike a woman's) neither trigger any constitutional protections nor promote any legitimate social values. \textit{Id.} at 1429-30, 1434 n.184. Another arbitrary distinction in the wrongful death act area involves the viability requirement. \textit{Id.} at 1419 (previability injury should be treated similarly to postviability injury).

\textsuperscript{120} Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 18-19, 148 N.W.2d 107, 110 (1967). This does not suggest, however, that damages will necessarily, or even usually, be more substantial in cases involving stillbirth than in cases involving birth with handicaps.
in the law as victims. Yet even where the unborn are recognized as victims of crime, irrational differentiations are sometimes made between one form of criminal conduct and another. For example, while California does proscribe in its murder statute the nonconsensual killing of a fetus, its manslaughter statute does not so proscribe. In Mississippi and Rhode Island, manslaughter includes only the willful killing of an unborn quick child, apparently failing to recognize nonquickened fetuses as victims.

As with the need for more direct laws preventing handicaps to newborns, the exploration of the means necessary to create more coherent laws will cause some discomfort and should be guided by the understanding that the state can legitimately protect the unborn in many settings by deeming them to be persons worthy of legal rights and protections. Little discomfort should be felt in implementing many necessary changes to eliminate differentiations among the born, unborn, and varying types of unborn. Thus, one whose acts impact upon a person of childbearing capacity may be deemed to owe that person's potential offspring some duty to exercise due care, regardless of whether the person is pregnant or at the viability stage of a pregnancy. Further, one who intentionally assaults a visibly pregnant woman without her consent should be deemed to be acting criminally against the fetus, regardless of fetal viability, the subsequent live birth of the fetus, or the nature of the injury to the fetus. As there are no constitutionally-protected privacy rights regarding assaults against the unborn, there is no reason why one causing a stillbirth should be treated differently than one whose acts cause a newborn to expire after a very short afterbirth life. Similarly there is no reason why one whose prenatal acts caused a newborn serious physical and mental handicaps should be treated differently than one whose prenatal acts caused a fetus to be still born or a newborn to expire after a very short afterbirth life.

121. See supra note 105 and accompanying text.
123. MISS. CODE ANN. § 97-3-37 (1972).
125. See, e.g., ALASKA STAT. § 18.16.010 (1981) (forbidding certain operations seeking to terminate the "pregnancy of a nonviable fetus"), and consider whether even that statute has the nonquickened fetus as a victim. See also Roe. 410 U.S. at 151.
126. The distinction has been made, but was unsupported by reasons other than the common law tradition and the lack of a clear legislative intent to overturn such a practice. State v. Anderson, 135 N.J. Super. 423, 428, 343 A.2d 505, 508-09 (Law Div. 1975).
127. Id.
C. Adequate Laws

Even with more direct and more coherent laws providing better compensation in tort and greater deterrence through criminal sanction, laws promoting the prevention of handicaps to newborns still would be inadequate if they operated only after the onset of the handicaps sought to be prevented. In situations where preventable handicapping conditions appear, the law does little to assist in the avoidance or elimination of the future newborn’s handicaps. The laws’ failure in this regard is particularly troublesome in circumstances where any litigation in tort is not likely to result in significant compensation for loss 128 and where the criminal law may not operate. 129

There are several circumstances in which contemporary law might be deemed inadequate. One such circumstance arises where a person is about to commit a tortious or criminal act likely to produce handicaps to a newborn and the law disallows injunctive relief to bar such an act. 130 Another circumstance might be where large numbers of entities are preparing to act in a way likely to produce handicaps in newborns, with any prospect of later assessment of individual responsibility highly unlikely. 131 Yet another might be where the individuals responsible for some foreseeable future persons’ birth handicaps are not likely to be around when the handicapped newborns appear. 132

Contemporary law may be able to provide more adequate protection of newborns from physical and mental handicaps in several ways. Part of the answer lies in the more immediate use of medical

128. For example, compensation may not be forthcoming where parental tort immunity exists; where industry-wide acts preclude one from demonstrating any necessary link between injury and a particular actor; and where the time lag between act and resulting handicap is long enough that the actor can no longer be found, at least with money.

129. For example, it may be found to be noncriminal to cause injury recklessly, at least where the actor was unaware of the link between act and injury; or to cause injury intentionally, at least where public policy supports noninfringement on prospective parents’ freedoms through the absence of criminal sanctions beyond those generally applicable to the populace.

130. For example, an unborn may not be a “person” entitled to bring suit on its own behalf. Similarly, an unborn may not be able to show irreparable harm based on a non-life-threatening handicap.

131. Later assessment is often unlikely because of an inability to match injuries to acts of a particular entity. See supra note 45.

132. See, e.g., 67 Ill. 2d at 376-77, 367 N.E.2d at 1264 (Ryan, J., dissenting) (suggesting up to thirty-seven years could have passed between defendant’s action and plaintiff’s handicap).
and scientific advances regarding the unborn to promote the further federal regulatory protection of the unborn, together with the expansion of state child support, abuse, and custody laws and the possible imposition of mandatory screening and procreation laws, which are scientifically and morally justifiable. Certainly necessary are the traditional legal protections, usually encompassing tort and criminal law, together with financial support promoting medical and scientific research, the free flow of information to whomever is interested, and voluntary screening for certain hereditary disorders. But they are inadequate during an era when significant new insights into the causes of handicaps at birth are commonplace.

1. **Federal Regulatory Protection**

To date, as a result of conflicting and ambiguous statutory mandates, federal regulatory protection of the unborn has been spotty and is often founded on rather precarious ground. Further protection would be possible if delegations of authority to federal agencies were more harmonious and more explicit regarding the agency's duty to safeguard the unborn.

One illustration of seemingly conflicting mandates is the interface between the responsibilities under the Civil Rights Act of 1964 and the Occupational Safety and Health Act (OSHA) in a work environment potentially toxic to fetuses. The employer controlling such an environment has the duty to comply with the standards of the Secretary of Labor under OSHA, which ensure that "no employee will suffer material impairment of health or functional capacity." Standards for occupational exposure to lead provide an example of where "functional capacity" was read to include the capacity to produce healthy children and thus, the promotion of fetal protection led to differing treatment of pregnant women in the workplace. Yet these standards have been found to be difficult to reconcile with the 1978 Pregnancy Amendment to title VII of the Civil Rights Act, which states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for

135. For a review of the standards for occupational exposure to lead, and a criticism thereof for not more fully ensuring prevention of fetal harm, see Furnish, supra note 47, at 70-74.
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all employment-related purposes."-137 This difficulty has been recognized but can not be reconciled by the Equal Employment Opportunity Commission.138 Several suggestions on how harmony may be achieved have recently been offered.139 The problems revealed by the foregoing conflict are compounded by certain ambiguities in the relevant statutory language. For example, it has been suggested that the Secretary of Labor's interpretation of "functional capacity" as including the capacity to produce healthy children is erroneous.140

An illustration of inadequate protection of the unborn resulting from liberal delegation of congressional power can be found in Burns v. Alcala.141 In that case, the Supreme Court of the United States faced the question of whether states receiving federal financial aid under the AFDC program142 must offer welfare benefits to pregnant women for their unborn children.143 Viewing the issue solely as one of statutory construction,144 the Court responded in the negative after finding that the phrase "dependent children" did not encompass fetuses.145 The Court noted that Congress had provided for medical care to expectant mothers in another federally-funded program.146 Yet that program was not mandatory upon the states providing welfare benefits to children.147 The Court noted that

137. Id.
139. Id. at 115-18; Williams, supra note 10, at 668-703; Howard, supra note 110, at 798. Of course, harmony can be further threatened if states decide to extend protections beyond the parameters of federal law, finding no preemption. Conn. Gen. Stat. Ann. § 31-372(a) (West Supp. 1982) (labor commissioner can prompt occupational and health standards "in special circumstances" where no federal standards are applicable); id. § 46a-60(a)(7) (deeming as a prohibited discriminatory employment practice an employer's failure to provide reasonable means for temporary work transfers for pregnant women who believe continued employment in a position may cause injury to the fetus).
143. 420 U.S. at 576-77.
144. Id. at 577.
145. Id. at 580.
146. Id. at 583 n.10 (citing Wisdom v. Norton, 507 F.2d 750, 755 (2d Cir. 1974)).
although the states had an option to claim federal matching funds for AFDC payments to pregnant women, 148 thirty-four different state plans under the AFDC program had been approved without any aid to unborn children. 149

Given the express congressional concern with reducing "the incidence of preventable diseases and handicapping conditions among children . . .," 150 further explicit delegations of regulatory authority regarding the protection of the unborn are needed. For example, the authority to promulgate labeling requirements might be delegated so that consumers and others would have better access to information regarding the potential harm to their offspring inherent in certain products. 151 Also, the prohibition of certain hazardous substances might be broadened to include substances possessing the potential for significant harm to future generations of people, although they pose little or no threat to the present populace. 152

2. Child Support, Abuse and Custody Laws

As noted, the regulation of prenatal conduct by prospective parents in order to prevent birth handicaps offers differing parental perspectives than does the regulation of parental conduct involving children who have truly gained a separate biological existence. 153 Additionally, the public policy perspectives are different in that there are differing classes of people who are prospective parents, 154 differing constitutional values, 155 and differing health and safety considerations. 156 Nonetheless, prevailing child support, abuse, and custody

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148. 420 U.S. at 579.
149. Id. at 579-80 n.5 (citing Alcala v. Burns, 494 F.2d 743, 745 (8th Cir. 1974)).
151. For example, such warnings exist regarding the use of saccharin. See also 15 U.S.C.A. § 1333 (West 1982) (statutory, as opposed to regulatory, requirement regarding labeling of a dangerous product).
153. Supra note 113-114, and accompanying text.
154. Conceptually, most newborns are prospective parents, as are even the unborn themselves. The major obstacle to regulating newborns and the unborn as prospective parents is the lack of significant, relevant medical and scientific understanding.
155. Born children are persons entitled to fourteenth amendment protection, while unborn children are not. 410 U.S. at 156-57.
156. Handicaps which are preventable after birth differ significantly from potential birth handicaps preventable prior to birth. As well, the number and type of actors able to
laws provide much insight into the available means of preventing handicaps to newborns.

There is already some precedent for the quite simple proposition that "a child conceived but not yet born [is owed a duty by a parent to furnish] necessary . . . medical attendance or other remedial care."\(^{157}\) That proposition should be more universally adopted, with civil actions on behalf of the unborn child available to enforce this parental duty.\(^{158}\) Enactment of the proposition in a criminal code would trigger state action only after the opportunity to file civil proceedings has passed and when the breach of duty may have already resulted in irreparable harm to the developing fetus.

Besides extending the parental duty to support to the furnishing of necessities to conceived but unborn children, laws should also protect the unborn from their prospective parents' abusive acts. Unlike the duty to support, a duty to refrain from abusive acts should be owed by prospective parents to their unconceived, as well as conceived, unborn children. Enforcement of the duty could be delegated, in part, to a state health and welfare agency, which would possess the authority to obtain cease and desist orders with respect to certain conduct by prospective parents.\(^{159}\) Such enforcement would be facilitated by passage of mandatory reporting laws, which would increase the agency's access to information regarding conduct potentially harmful to the unborn. Discussion of such laws has only recently become worthwhile, as scientific and medical advances in the past few years have produced significant new insights into the link between prenatal conduct by prospective parents and others and


\(^{158}\) Such a civil action was allowed in Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P.2d 806 (1940) (relying on the California Penal Code provision regarding furnishing of necessities to unborn children, as well as Civil Code provisions on establishing paternity and on the parental duty to support illegitimate children). But see Justus v. Atchison, 19 Cal. 3d 564, 579, 565 P.2d 122, 132, 139 Cal. Rptr. 97, 107 (1977) (suggesting that Civil Code provisions on "children" might not apply to the unborn for the legislative enactment does not contain "specific" intent or "appropriate terms"); In re Steven S., 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (1981) (relying on the decision in Justus to find unborn fetus not a "person" under dependent child statute).

\(^{159}\) See, e.g., In re Baby X, 97 Mich. App. 111, 293 N.W.2d 736 (1980) (custody of newborn awarded to state based on proof of mother's prenatal treatment, wherein neglect was found resulting from prenatal maternal drug addiction).
newborns' birth handicaps.\textsuperscript{160} As further insights are gained, preventive child abuse laws may be feasible for conduct long preceding even the conception of the child who is to be protected from abuse.

At times, state protection of unborn children from the abusive acts of their prospective parents might require assertion of custody over those children. Quite obviously, such assertions would also entail state custody of either the prospective mother or father. There is precedent for such custody orders, but its scope is limited. In one case involving state custody of an unborn child, a woman in her last week of normal pregnancy had refused to undergo a caesarian section on religious grounds.\textsuperscript{161} Without the section, there was a virtual certainty that the unborn child would die and a fifty percent chance that the woman would die; with the section, there was a virtual certainty that both the unborn child and the woman would survive.\textsuperscript{162} The court granted temporary custody of the fetus to a state agency and authorized the agency to consent to the performance of the caesarian section and any other necessary medical procedures for a successful birth.\textsuperscript{163} In a second case involving a third trimester pregnancy, a court found the woman would need blood transfusions some time prior to delivery in order to preserve her own life and the life of her child.\textsuperscript{164} Again, the woman posed religious objections, but again the court issued an order requiring the medical treatment when deemed necessary.\textsuperscript{165} These two cases are of limited scope because in both cases the judicially-ordered medical treatment would preserve the life of both the unborn and its mother.

State assumption of custody of a prospective parent for the purpose of protecting that parent's future offspring would also be legitimate even where the parent's life is not threatened, but where the child's future well being, as opposed to its life, is threatened.\textsuperscript{166} Cer-
tainly, the state interest would have to be compelling in cases involving pregnant women and others who have constitutionally protected privacy rights\(^{167}\) that may be undermined even though they gain no physical benefits. Yet, a strong case can be made for state custody in a detoxification center of a pregnant woman addicted to heroin.\(^{168}\) There is also an arguable case for state custody of both males and females of childbearing age for the purpose of conducting genetic tests geared to providing information about the prospective of preventable handicaps—particularly where the tests are not very intrusive and where the means of prevention are available and easily employed.\(^{169}\)

3. Procreation Laws

The most controversial legal means of protecting newborns from physical and mental handicaps is the regulation of procreation so that certain newborns will never be born.\(^{170}\) Such laws are founded on the premise that it is sometimes better not to be born than to be born. Because this premise has already served as the basis for certain tort\(^{171}\) and criminal\(^{172}\) laws, it seems appropriate to ex-

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\(^{167}\) 410 U.S. at 153-53 (right to personal privacy has some extension to activities relating to marriage, procreation, family relationships and childrearing).


\(^{170}\) Supra note 91 and accompanying text.

\(^{171}\) Turpin, 643 P.2d at 963, 182 Cal. Rptr. at 346, wherein the court stated:

Considering the short life span of many of these children and their frequently very limited ability to perceive or enjoy the benefits of life, we cannot assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all . . . it thus seems doubtful that a child's claim for general damages should properly be denied on the rationale that the value of impaired life, as a matter of law always exceeds the value of nonlife . . .

\(^{172}\) See supra note 11.
plore how handicap prevention might be promoted through the discouragement or prohibition of certain births.

Births can be discouraged in a number of ways, including the creation of financial incentives and the regulation of decision-making regarding childbirth. Of course, state action cannot be unduly burdensome. Recognition of an unborn’s interest in not being born with severe handicaps could thus be encouraged by state financial support of the prospective parent’s desire to abort, or to procure either a prenatal screening test such as amniocentesis or a surgical operation leading to sterility. Given the accessibility of abortions, births of newborns with severe handicaps could also be discouraged by the state determination not to provide financial assistance to certain parents who give birth to newborns with severe handicaps. Regulations of decision-making regarding childbirth could also discourage the birth of handicapped newborns by facilitating access to sterilization and other forms of contraception to those incompetent prospective parents who do not wish to bear such children.

As well, births can be prohibited in a number of ways. For example, involuntary sterilization laws prohibit the birth of newborns likely to suffer from certain hereditary ailments. Such a compulsory eugenic sterilization law was sanctioned by the Supreme Court of the United States over fifty years ago in *Buck v. Bell*.

176. Consider whether prohibition of the birth of a handicapped newborn would be justified when the mother is clinically dead. See Chicago Sun-Times, Jan. 22, 1983, at 38, col. 1 (mother clinically dead for two days gave birth to premature baby, although doctors tried to discourage father from requesting birth as they felt baby was deformed); compare *id.*, Mar. 31, 1983, at 32, col. 1 (woman who was brain dead for sixty-four days gave birth to healthy baby and then had her life support system discontinued). See also Dillon, *Life Support and Maternal Brain Death During Pregnancy*, 248 J. AM. MED. A. 1089 (1982).
177. 274 U.S. 200 (1927). In part, the Virginia law may also have been founded on social need, such as sterilization to prevent the birth of a child whose parents cannot care
There, the Court upheld a Virginia statute which provided for the sexual sterilization of any mentally defective inmate of a state institution where "the health of the patient and the welfare of society" would be promoted.\textsuperscript{178} The statute was applied in \textit{Buck} to an eighteen year old woman who was the daughter of a feeble-minded woman, the mother of an illegitimate feeble-minded child, the probable potential parent of socially inadequate offspring likewise afflicted, and who was capable of being sterilized without detriment to her general health.\textsuperscript{179} The decision in \textit{Buck} continues to be regarded as authority supporting the validity of compulsory eugenic sterilization laws,\textsuperscript{180} although there is now dispute about some of its scientific findings,\textsuperscript{181} its mode of legal analysis,\textsuperscript{182} and its view of legitimate governmental interests.\textsuperscript{183} Should more acceptable scientific understanding be developed on the role heredity plays in handicaps to newborns, compulsory eugenic sterilization laws may again be fashionable.\textsuperscript{184}

Births of newborns with handicaps can also be prohibited through the passage of criminal incest laws. In Illinois, the crime of aggravated incest is defined as including sexual intercourse between any male and his blood daughter or between any female and her blood son, regardless of the daughter's or son's age.\textsuperscript{185} Because prosecutions can occur even when the son or daughter is over 21 years of age, and thus is "sufficiently mature and autonomous to be free from it. Compulsory sterilization laws founded on such social need raise even more questions than do eugenic sterilization laws. Farness & Pritchard, \textit{supra} note 75. at 290-91.

\textsuperscript{178} 274 U.S. at 205.
\textsuperscript{179} \textit{Id.} at 207.
\textsuperscript{181} 274 U.S. 200, 207-08 (1927), for proposition that the privacy right is not absolute).
\textsuperscript{183} See, e.g., North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451, 458 (M.D.N.C. 1976) (noting that a rational basis, rather than compelling state interest standard was used in \textit{Buck}).
\textsuperscript{184} \textit{In re Moe}, 385 Mass. App. Ct. 555, 560, 432 N.E.2d 712, 717 (1982) (state has no recognizable interest in compelling the sterilization of its citizens); \textit{In re Grady}, 85 N.J. 235, 246-47, 426 A.2d 467, 472-73 n.3 (1981) (finding eugenic sterilization to be immoral); \textit{CAL. CIVIL CODE} § 43.6(a) (West 1982) ("No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive").
\textsuperscript{185} \textit{In re A.W.}, 637 P.2d 366, 368-69 (Colo. 1981) (compulsory sterilization law would be constitutional if it furthered a compelling governmental interest—though no contemporary statutes were found to further such an interest).
\textsuperscript{186} \textit{ILL. ANN. STAT.} ch. 38, § 11-10 (Smith-Hurd 1979).
undue parental pressure to submit to sexual advances,"186 biological risks to the offspring serve as the exclusive legitimate state interest in the legislation.187

V. Conclusion

While the concentration on the legal means of securing additional rights for handicapped persons is commendable, the general failure to address the legal means by which handicaps in newborns can be prevented is unfortunate. Recent scientific and medical advances have greatly expanded the role which law can now play in avoiding or eliminating many potential birth handicaps. As well, contemporary discussion of possible legal reaction to further scientific and medical advances is warranted. It should aid in expediting legal innovations upon the arrival of such advances and thus reduce the harm accruing during the traditional time lag between scientific and legal change.

At the present time, laws promoting the prevention of handicaps to newborns are indirect, incoherent and inadequate. Laws should be made more direct, thereby recognizing the unborn as persons entitled to protection from prenatal acts likely to cause them handicaps at birth. Laws should be made more coherent so that when the unborn are recognized as persons, the fullest legal protection possible is extended on their behalf. Finally, laws should be made more adequate, extending beyond the traditional tort and criminal law areas into such areas as federal regulatory protection, child support, abuse and custody acts, and laws discouraging or prohibiting procreation. The time has come to discuss more fully our responsibility for our future childrens' health and well-being.

186. Id. (committee comment).
187. While cultural traditions are sometimes noted, id., they serve as an inappropriate basis. Supra note 11. See also R. v. Winch, 1974 CRIM. L. REV. 487 (relying on the possible disastrous effects on any children).