

**COMMONWEALTH OF KENTUCKY
SUPREME COURT**

CASE NO. 2001-SC-571 and 2001-SC-959-DG

NATHAN ROBERT BOGAN, ET AL., APPELLANTS/CROSS-APPELLEES

v.

ALTMAN, MCGUIRE, & PIGG, P.S.C. ET AL., APPELLEES/CROSS-APPELLANTS

Appeal from the Kentucky Court of Appeals
Case No. 1999-CA-000212
Pike Circuit Court, First Division
Case No. 94-CI-00434

Consolidated with:

CASE NO. 2001-SC-563-DG and 2001-SC-961-DG

CARLEI NACOLE GRUBBS, ET AL. APPELLANTS/CROSS-APPELLEES

v.

BARBOURVILLE FAMILY HEALTH APPELLEES/CROSS-APPELLANTS
CENTER, P.S.C., ET AL.

Appeal from the Kentucky Court of Appeals
Case No. 1999-CA-000468-MR
and
Case No. 1999-CA-000563-MR
Knox Circuit Court
Case No. 1997-CI-00277

**BRIEF OF CATHOLICS UNITED FOR LIFE, NORTHERN KENTUCKY RIGHT
TO LIFE, KENTUCKY COALITION FOR LIFE, AMERICAN CENTER FOR
LAW & JUSTICE, AMICI CURIAE, IN SUPPORT OF CROSS-APPELLANTS**

**STATEMENT OF THE IDENTITY AND INTEREST
OF THE AMICI CURIAE**

Catholics United for Life (“CUL”), Northern Kentucky Right to Life (“NKRL”), Kentucky Coalition for Life (“KCL”) and the American Center for Law and Justice-Midwest (“ACLJ”) are organizations committed to the promotion and preservation of the sanctity of human life — both here in the Commonwealth and throughout the country. These groups advance this commitment through litigation, education, and similar activities. It is because of the sanctity of life at issue in this case that these groups move to appear as amici curiae.

ARGUMENT

The case *sub judice* provides this Court with the opportunity to reaffirm what it taught over fifteen years ago: “Wrongful life is a contradiction in terms. It is contrary to the public policy of this State as expressed by the legislature and interpreted by the courts. The establishment of a cause of action based on the matter of wrongful conception, wrongful life or wrongful birth is clearly within the purview of the legislature only.” *Schork v. Huber*, Ky., 648 S.W.2d 861, 863 (1983).

Claims for “wrongful birth” and “wrongful life” cannot be considered as negligence actions only, as assumed by the Court of Appeals below, with no consideration of their profound societal implications and consequences; rather, they are causes of action which, if recognized in this Commonwealth, would undermine several important and abiding principles of civil society: the intrinsic value of human life, including the dignity of disabled persons, and the integrity of the family. Moreover, as held in *Schork*, for this Court to take cognizance of such causes of action would run seriously afoul of the separation of powers mandated by the Kentucky Constitution.

As argued herein, CUL, NKRL, KCL, and ACLJ respectfully urge this Court to: (1) reverse the Court of Appeals decision creating a cause of action for wrongful birth, and (2)

affirm the decision, albeit on different grounds, the decision to reject a cause of action for wrongful life. Such a decision will not only properly dispose of the case now before this Court in accordance with the law and sound policy, it will establish a firm precedent in defense of the dignity of the human person — both here in the Commonwealth and the country as a whole.

I. THIS COURT SHOULD REFUSE TO CREATE A LEGAL CAUSE OF ACTION FOR “WRONGFUL LIFE.”

A. A claim for wrongful life should not be created because such a claim is an affront to the sanctity of human life.

A claim for wrongful life is based upon the radical premise that the plaintiff’s very existence is a compensable wrong. *Atlanta Obstetrics and Gynecology Group, P.A. v. Abelson*, 398 S.E.2d 557, 560 (Ga. 1990) (“An action for ‘wrongful life’ is brought on behalf of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant to its parents, the child would never have been born”) (quoting *Fulton-DeKalb Hosp. Auth. v. Graves*, 314 S.E.2d 653, 443 (Ga. 1984)). While the terminology in this area of law is not fixed, a wrongful life claim brought on behalf of a child is theoretically distinguishable from those brought by the child’s parents, either one for wrongful pregnancy or conception (pre-conception negligence) or one for wrongful birth or life (post-conception negligence). See *Siemieniec v. Luther Gen. Hosp.*, 512 N.E.2d 691, 694-96 (Ill. 1987).

A claim for wrongful life necessarily places the law in the unusual position of affirming that death, or non-existence, is preferable to life — a decision clearly beyond the province of a court of law. As explained by the highest court of the State of New York rejecting the tort of wrongful life:

Whether 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. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.

Becker v. Schwartz, 386 N.E. 2d 807, 812 (N.Y. 1978). Indeed, any general damages for a so-called “wrongful life” must necessarily be calculated by determining that the plaintiff’s non-existence would be more valuable than the plaintiff’s life. Again, the New York Court of Appeals:

Simply put, a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson’s choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make.

Id.

Because of the “nearly universal” reluctance, *Williams v. Univ. of Chicago Hosp.* 688 N.E.2d 130, 133 (Ill. 1997), to adopt a premise that devalues human life so completely, the overwhelming majority of courts, which have considered the issue, have rejected claims for wrongful life. *Elliott v. Brown*, 361 So. 2d 546 (Ala. 1978); *Walker v. Mart*, 790 P.2d 735 (Ariz. 1990); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988); *Garrison v. Medical Center of Delaware, Inc.*, 581 A.2d 288 (Del. 1989); *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992); *Blake v. Cruz*, 698 P.2d 315 (Idaho 1984); *Goldberg v. Ruskin*, 499 N.E.2d 406 (Ill. 1986); *Bruggeman v. Schimke*, 718 P.2d 635 (Kan. 1986); *Viccaro v. Milunsky*, 551 N.E.2d 8 (Mass. 1990); *Taylor v. Kurapati*, 600 N.W.2d 670 (Mich. Ct. App. 1999); *Greco v. United States*, 893 P.2d 345 (Nev. 1995); *Smith v. Cote*, 513 A.2d 341 (N.H. 1986); *Becker, supra*; *Azzolino v. Dingfelder*, 337 S.E.2d 528 (N.C. 1985); *Hester v. Dwivedi*, 733 N.E. 1161 (Ohio 2000); *Speck v. Finegold*, 439 A.2d 110 (Pa. 1981); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985); *Dumer v. St. Michael’s Hospital*, 233 N.W.2d 372 (Wis. 1975); *Nelson v. Kruzen*, 678 S.W.2d 918 (Tex. 1984).

The primary reasons for rejecting this claim do not simply involve the difficulty in applying traditional tort concepts such as duty, breach, injury, proximate cause, and damages — as done by the Court of Appeals below. Rather, the reasons for rejecting a wrongful claim go to the core of the dignity of the human person and the sanctity of human life itself.

As expressed by the Supreme Court of Idaho:

Basic to our culture is the precept that life is precious. As a society, therefore, our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence. To recognize wrongful life as a tort would do violence to that purpose and is completely contradictory to the belief that life is precious.

Blake, 698 P.2d at 322.¹ Consider, too, the observation of the Illinois Supreme Court:

A number of courts have relied on “the preciousness and sanctity of human life” in refusing to recognize wrongful life as a legally cognizable cause of action. These courts have reasoned that recognizing a duty to the unborn child to prevent his birth with defects represents a “disavowal” of the sanctity of life. Such a disavowal of life offends society’s deeply rooted belief that life, in whatever condition, is more precious than nonexistence.

Siemieniec, 512 N.E.2d, 701-2. As discussed *infra*, for the Court of Appeals below to reject the tort of wrongful life simply on the grounds that it fails the first prong of the traditional negligence calculus, duty, is a little like saying that the Holocaust was wrong, not because it resulted in the death of millions of innocents, but because it resulted in the decrease of a taxpayer base — in other words, it misses the real point. What the Supreme Court of New Hampshire noted fifteen years ago, when it rejected the tort of wrongful life, remains obviously true today: a court “has no business declaring that among the living are people who should never have been born.” *Smith*, 513 A.2d at 353.²

In contrast to the view which bases laws upon a sanctity of life ethic — which respects human life simply because the life is human — is a “quality of life” ethic. Such a

¹ See also, *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 200-01 (Ill. 1983): “One can, of course, in mechanical logic reach a different conclusion [regarding whether to recognize wrongful life], but only on the ground that human life and the state of parenthood are compensable losses. In a proper hierarchy of values the benefit of life should not be outweighed by the expense of supporting it. Respect for life and the rights proceeding from it are at the heart of our legal system and, broader still, our civilization.”

² As noted by the Michigan Court of Appeals, the phrase “better that they not be born,” which is of course the premise upon which either a wrongful birth and wrongful life action is based, may have its origin in the *Gospel of Matthew*: “It had been good for that man [Judas Iscariot] if he had not been born.” Mt. 26:24. *Taylor*, 600 N.W.2d at 680, n. 32. “If so,” writes the court, “the implicit comparison between Judas, the betrayer of Jesus, and the disabled is chilling.” *Id.*

so-called “ethic” values human life only when the life measures up to certain arbitrary standards. When society condones arbitrary, non-rational line-drawing about the “worth” of human life, whether on alleged genetic grounds or otherwise, it invites “ploys for the extermination of a weaker group by a stronger and more powerful one.” *Speck*, 439 A.2d at 119. The quality of life ethic favors the life of the healthy over that of the infirm, the able-bodied over the disabled, the intelligent over the mentally challenged — in sum, the strong over the weak. For this Court to recognize the tort of wrongful life, and thereby permit disabled children to obtain damages for their very existence, would be an affront to the dignity of human life. This Court has rejected the quality of life ethic once, and it should do so again. See *DeGrella by and through Parrent v. Elston*, Ky., 858 S.W.2d 698, 702 (1993) (“ . . . the individual’s ‘inalienable right to life,’ as so declared in the United States Declaration of Independence and protected by Section One (1) of our Kentucky Constitution, outweighs any consideration of the quality of the life, or the value of the life, at stake”).

B. A claim for wrongful life does not conform to traditional tort analysis because of its inherent logical contradictions.

When the traditional tort concepts are applied to a wrongful life claim, the immense legal and philosophical contradictions which have resulted in the nearly universal rejection of this type of claim by the courts become apparent. *Nelson v. Kruzen*, 678 S.W.2d 918, 930-31 (Tex. 1984) (Robertson, J., concurring). As the Court of Appeals below correctly noted — again, however, for the wrong reasons — applying the duty prong to a wrongful life claim raises several problems. In brief, by what rational standard should the law impose upon a physician a duty to provide information and advice calculated to result in the death of the unborn child? With respect to proximate cause, and where the claim involves severe birth defects, such as those Nathan suffers — which is not created by any act or omission of the physician — by what rational standard should the law impose upon a physician financial

responsibility for a condition the physician did not cause? *Speck*, 439 A.2d at 119.

With respect to injury, and this recalls the previous discussion regarding the sanctity of human life, by what rational standard should the law say that a person's very existence is in itself an injury compensable at law? As succinctly stated by the Supreme Court of North Carolina, "life, even life with severe defects, cannot be an injury in the legal sense." *Azzolino*, 337 S.E.2d at 532. Indeed, how can it? In rejecting a cause of action for wrongful life, the Supreme Court of Alabama opined:

Upon what legal foundation is the court to determine that it is better not to have been born than to be born with deformities? If the court permitted this type of cause of action, then what criteria would be used to determine the degree of deformity necessary to state a claim for relief. We decline to pronounce judgment in the imponderable area of nonexistence.

Elliot, 361 So. 2d at 548. The attempt to give value to such a purported "injury" as life itself is patently an impossible one. Putting the matter in concrete terms, the Supreme Court of Illinois quotes *Comment, The Trend Toward Judicial Recognition of Wrongful Life: A Dissenting View*, 31 U.C.L.A. L. Rev. 473, 498-99 (1983):

If the child's point of view is not determinative [on damages], and an objective, reasonable person standard is applied in deciding to award wrongful life damages, frivolous claims may no longer be a problem, but line-drawing still comes into play. Judges and juries will have to determine the degree of impairment that renders a child's nonexistence preferable to existence. Not only will such a judgment be unpalatable, but persons making this judgment can look only to their own feelings or fears of being handicapped in deciding the merits of the claim. This may reinforce prejudicial judgments that certain handicapped plaintiffs always deserve compensation, while healthy infants born in other adverse circumstances never deserve legal compensation for their birth.

Siemieniec, 512 N.E.2d at 699-700. Moreover, it is very significant to note that even the three jurisdictions which have recognized a claim for wrongful life have refused to permit an award of general damages. *Curlender v. Bio-Sciences Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980); *Turpin v. Sortini*, 31 Cal.3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983). The basis for this is the same basis upon which the majority

of jurisdictions have rejected the wrongful life claims *in toto*, namely, that “measuring the value of an impaired life as compared to non-existence is a task that is beyond mere mortals, whether judges or jurors.” *Harbeson*, 656 P.2d at 496.

C. A claim for wrongful life should be rejected because it would heighten discrimination against disabled persons and lead to a eugenic mentality whereby the “unfit” are made disposable.

If this Court permits a wrongful life claim to be recognized in the courts of the Commonwealth then the full weight of the tort system is being placed behind a horrific eugenic policy which says that doctors will be punished who do not aggressively identify and assist in the elimination of disabled children in the womb. Whatever the merits of pre-conception genetic counseling, and given the quickly ever-developing ability to map out the genetic structures of individuals, there will be significantly greater pressure upon doctors to strongly counsel abortion in order to avoid a claim of post-conception negligence (either wrongful life or wrongful birth), even where there is only a slight risk of abnormality. *Comment, The Trend Toward Judicial Recognition of Wrongful Life, supra*, at 500. A physician need only face one such case to take steps to ensure that it not happen again; and certainly parents receiving counseling which stresses the undesirability of having a potentially impaired child are almost certain to opt for abortion. Such a mentality will make the impaired child’s own mother’s womb the most dangerous place for him or her to be.

These concerns have caused some courts to note the “Hitlerian” potential associated with wrongful life claims. *Dumer*, 233 N.W.2d at 379 (Hansen, J., dissenting and concurring). The inherent danger in such a quality of life attack on the disabled becomes apparent when the concrete situations are examined. What “defect” will the law recognize as compensable? Mental only? If so, must the mental disability be severe? Who defines “severe”? Who will draw the line? Will physical impairment alone be enough? If so, must it be a severe and painful impairment or will an impairment such as allergies, deafness or near-sightedness qualify? (*Turpin v. Sortini, supra*, involved a deaf child.)

How does the law take into account that deaf or blind people, and many so-called “disabled” persons, can and do have lives of immense value to themselves and others? If law is to be grounded in the truth of practical reason, and thereby respect the fundamental goods of human persons, including the good of life itself, then the wrongful life action and its attendant slippery quality of life ethic should be rejected by this Court in the strongest of terms.

II. THIS COURT SHOULD REVERSE THE COURT OF APPEALS DECISION BELOW RECOGNIZING A LEGAL CAUSE OF ACTION FOR WRONGFUL BIRTH.

Applying a traditional negligence standard to the case before it, the Court of Appeals below held that wrongful birth constituted a cognizable cause of action in this Commonwealth. With little discussion, let alone application, of duty, breach, injury and causation to the wrongful birth action before its bar, the Court of Appeals simply held “should the plaintiffs prove the elements of medical negligence . . . they are entitled to compensation for the damages that flow from the negligence.” Slip Op. at 10. As discussed *supra*, how would a plaintiff, how could a plaintiff, prove such elements? For many of the same reasons why this Court should reaffirm its rejection of a wrongful life claim, it should reject one for wrongful birth as well.

A. A claim for wrongful birth should not be recognized because it, like a wrongful life claim, requires that life itself constitute a legal injury.

A claim for wrongful birth refers “to the claim for relief of parents who allege that the negligent treatment or advice deprived them of the choice of terminating pregnancy by abortion and preventing the birth of the defective child.” *Azzolino*, 337 S.E.2d at 531 (citing *James G. v. Caserta, supra*). In other words, the parents of a “defective” child come to court saying that it would have been better had their child been aborted. *Atlanta Obstetrics and Gynecology Group, P.A.*, 398 S.E.2d at 560 (“‘wrongful birth’ . . . alleges basically that, but for the treatment or advice provided by the defendant, the parents would have

aborted the fetus, thereby preventing the birth of the child”).

A key element in the success or failure of such birth-related tort claims is whether the child is “normal” or “impaired,” however subjective those terms may be. No wrongful life claim, including the present one, has been recognized unless the child was “abnormal” by some standard. *Procanik v. Cillo, supra* (claim recognized: rubella syndrome); *Turpin v. Sortini, supra* (claim recognized: deafness); *Curlender v. Bio-Science Laboratories, supra* (claim recognized: Tay Sachs disease); *Harbeson v. Parke-Davis, Inc., supra* (claim recognized: fetal hydantoin syndrome). Wrongful life claims by healthy, but unplanned or illegitimate children have been rejected. *Zepeda v. Zepeda*, 190 N.E.2d 849 (Ill. App. 1963) (healthy, illegitimate child); *Rieck v. Medical Protective Co.*, 219 N.W.2d 242 (Wis. 1974) (healthy, unplanned child).

Likewise, in the wrongful birth claims, where the alleged negligence is post-conception, courts are generally willing to see an “injury” only where the child is “abnormal.” This is so even though in cases involving both normal and abnormal children it is the birth and not the child’s existence or the child’s abnormality which is allegedly caused by the negligence. *See, e.g., Becker v. Schwartz, supra* (claim: Down’s Syndrome); *Siemieniec v. Lutheran Gen . Hosp., supra* (claim: hemophilia); *Dumer v. St. Michael’s Hosp., supra* (claim: rubella syndrome); *Speck v. Finegold, supra* (claim: neurofibromatosis).

These cases indicate that what is really taking place in these situations are quality of life determinations, and if this Court is to reject the claim for wrongful life because it does not wish to endorse a eugenics mentality³ — as well it should — then it should do so with a claim for wrongful birth as well. The Supreme Court of North Carolina, in *Azzolino v.*

³ “Eugenics espouses the reproduction of the ‘fit’ over the ‘unfit’ (positive eugenics) and discourages the birth of the ‘unfit’ (negative eugenics).” Bowman, *The road to eugenics*, 3 U. Chic. L. Sch. Roundtable 491 (1996).

Dingfelder, supra, realized that rejecting a claim for wrongful life necessarily required rejecting a claim for wrongful birth as well. Both claims require that the life of the child, as opposed to her non-existence, be characterized as a legal injury. This is something the North Carolina Supreme Court refused to do. Addressing those courts which, like the Court of Appeals below, would invoke the four-fold negligence standard to analyze wrongful birth claims, the court wrote:

Courts which purport to analyze wrongful birth claims in terms of “traditional” tort analysis are able to proceed to this point but no further before their “traditional” analysis leaves all tradition behind or begins to break down. In order to allow recovery such courts must then take a step into entirely untraditional analysis by holding that the existence of a human life can constitute an injury cognizable at law. Far from being “traditional” tort analysis, such a step requires a view of human life previously unknown to the law of this jurisdiction. We are unwilling to take any such step because we are unwilling to say that life, even life with severe defects, may ever amount to a legal injury.

Id. at 533-34 (emphasis in original).

North Carolina is not alone in seeing the relationship between wrongful life and wrongful birth, and how each fosters an impermissible, inhumane quality of life ethic. In *Atlanta Obstetrics and Gynecology Group, P.A. v. Abelson, supra*, the Supreme Court of Georgia refused to blindly follow the trend of permitting wrongful birth actions. Like the Supreme Court of North Carolina, the Georgia Supreme Court could not honestly apply the traditional tort analysis and hold in favor of a wrongful birth claim:

Where the traditional tort analysis begins to break down is with the third prong, that of injury. In order to satisfy that prong, we must recognize the life of the child as the injury which has been inflicted upon plaintiffs by the defendants The traditional tort analysis breaks down even further with the final prong, that of causation, as the defendants cannot be said to have caused the impairment in [the child].

Id. at 561. In sum, wrote the Georgia Supreme Court:

An analysis of traditional tort law principles, even as applied in an age of ever advancing medical technology, simply does not authorize a finding that a physician, who has provided postconception prenatal care to an expectant mother, should be held liable, even to a limited extent, for an impairment which the child unquestionably inherited from her parents and an impairment which was already in existence when the parents first came into contact with the physician.

Id. at 560.⁴

If the law is going to impose liability on health care providers in a situation where furnishing the genetic counseling is based upon a consideration of whether the risk of the procedure to a normal, unborn child outweighs the likelihood of discovering the existence of an impaired child, then the court is setting a standard for the health care provider that will encourage him or her to be more aggressive about providing the genetic counseling in marginal cases in order to avoid astronomical malpractice damage awards. *See, generally, Comment, The Trend Toward Judicial Recognition of Wrongful Life, supra*, at 499-501.

There is perhaps not a more insightful, in-depth, and candid opinion on the issue of wrongful birth than that of the Michigan Court of Appeals in *Taylor v. Kurapati, supra*. In *Taylor*, the Michigan Court of Appeals, observed that for the court to partially recognize the birth-related tort of wrongful conception, totally reject the tort of wrongful life, and yet wholly recognize wrongful birth, as it had done in previous cases, “defies all logic.” *Id.* at 684. Accordingly, holding that the “intellectual basis” for the previous decisions recognizing wrongful birth claims “no longer exists,” the court overruled those cases and rejected the tort of wrongful birth. *Id.* at 685.

The court rejected the wrongful birth claim based on its close relationship with the wrongful life claim, and though understanding the two claims have some superficial differences, the court refused to ignore the profound similarities. Why should a court of law, asked the Michigan Court of Appeals, refuse to hear a child’s claim for wrongful life action and yet permit the parents “to bring an action for wrongful birth on exactly the same facts The answer — and it appears to us be a rather self-evident answer — is that, if

⁴ Yet another practical difficulty in applying a straightforward tort analysis to a wrongful birth claim is the “inherent proof problem . . . in finding causation based on the after-the-fact, possibly self-serving, testimony that the parents would have sought an abortion had they known of the child’s potential disability.” *Taylor*, 600 N.W.2d at 687 n. 44.

there is to be any consistency to the law in this area, this Court should not have allowed [the parents] to bring such a wrongful birth action.” *Id.* at 684.

Should this Court reject the claim for wrongful life, as reason and law dictate, then logic and law require that it reject wrongful birth as well. To reject a claim for wrongful life, and yet recognize wrongful birth, would result in the same misshapen jurisprudence decried by the Michigan Court of Appeals. *Id.* at 686. This the Court should not allow.

B. A claim for wrongful birth should not be recognized because it advances the same quality of life ethic as does a claim for wrongful life.

An extremely significant element underlying claims for both wrongful life and wrongful birth is an impermissible quality of life judgment — a judgment about the disability, sickness, retardation, or other impairment of the unborn child. Indeed, the quality of life “ethic,” upon which wrongful birth is necessarily premised, was an important factor in the Michigan Court of Appeals’ decision to overturn its previous decisions holding in favor of wrongful birth claims. In rejecting the tort of wrongful birth, and its calculus for damages, the so-called “benefits rule,”⁵ the court spoke in explicit terms about the monster of eugenics lurking behind these birth-related causes of action:

[T]he use of the benefits rule in wrongful birth cases can slide ever so quickly into applied eugenics. The very phrase “wrongful birth” suggests that the birth of a disabled child was wrong and should have been prevented. If one accepts the premise that the birth of one “defective” child should have been prevented, then it is but a short step to accepting the premise that the births of classes of “defective” children should similarly be prevented, not just for the benefit of the parents but also for the benefit of society as a whole through the protection of the “public welfare.” This is the operating principle of eugenics.

Taylor, 600 N.W.2d at 688.

The logic and compelling power of this argument cannot be denied. Less than a century ago, we have seen the evil of eugenics, of those who would dare to declare the

⁵ The benefit rule “invites the jury in wrongful birth cases to weigh the costs to the parents of a disabled child of bearing and raising that child against the benefits to the parents of the life of that child.” *Taylor*, 600 N.W.2d at 688.

difference between the “fit” and the “unfit.” Should this Court permit a cause of action for “wrongful birth” — and thereby make an “impaired” child the stuff of a lawsuit during which his parents will claim that, but for the negligence, they would have aborted their own “unfit” child — this Court will strike a blow against the proposition that all human persons, no matter their race, religion, or ability, are precious and worthy of respect. To recognize a cause of action for wrongful birth is therefore not simply an academic, theoretical question; it will have profound effects on how our society looks upon those in most need of care and comfort. Such a decision will also strike at the very heart of society, the family itself. Consider the words of Justice Ward, dissenting from the Illinois Supreme Court’s reluctant decision to permit wrongful birth claims:

One cannot pass over how painful to parents and child alike an action by parents must be. Parents will show that they did not want the child in his condition and that he would have been aborted had it not been for the professional inattentiveness of a physician or other medical person. Had they known, he never would have been. It is public policy obviously to encourage love and harmony in family relationships. Public policy which in importance transcends individual disputes will hardly be served by lawsuits of this character.

Siemienic, 512 N.E.2d at 709 (Ward, J., concurring and dissenting).

A society which places equal value upon birth and abortion is, fundamentally, an unhealthy one. Eastland, *Who Put the Wrong in “Wrongful Births”*, 9 Human Life Rev. 69 (No. 3 1983). A state, such as Kentucky, may constitutionally favor child birth over abortion in its public policies, notwithstanding the private right of abortion, *Maher v. Roe*, 432 U.S. 464 (1977) (upholding state policy of funding only childbirth expenses for indigents).⁶

In this case, the Kentucky Supreme Court has the opportunity to either affirm the intrinsic value of human life or establish a precedent in favor of eugenics. If this Court

⁶ KRS 311.710 clearly indicates Kentucky’s public policy stance in defense of life: “. . . it is in the interest of the people of the Commonwealth of Kentucky that every precaution be taken to insure the protection of every viable unborn child being aborted.”

recognizes either wrongful life or wrongful birth, or both, then it is putting pressure upon doctors to deliver only “perfect” children, and the physician will be coerced to counsel that a prospective plaintiff be legally terminated. However, if this Court refuses to recognize a claim for post-conception wrongful life or wrongful birth, then physicians will be free to give balanced advice without fear of an unwarranted lawsuit. Even more importantly, this Court will have affirmed a principle central to the best traditions of our civilization, in general, and this Commonwealth in particular. It will have affirmed that the continued existence of a child, whatever impairments he or she may have, is an “injury” to no one — not to himself, not to his parents, not to his world.

Finally, it should be clear by now that this case does not merely invite a traditional tort analysis, as the Court of Appeals below so quickly assumed. No. This argument ignores the profound moral values at issue and can rightly be termed “superficial.” *Speck v. Feingold*, 439 A.2d at 119 (Nix, J., dissenting in part). One need only read the opinions of various jurisdictions 150 years ago to see how the traditional analysis of property or contract law was applied to another class of human beings. There, too, attorneys and judges used “traditional” principles and analyses to maintain, support, and defend the institution of slavery. This Court should not permit “black letter” law to “white out” what is truly and fundamentally at stake in this case. It should refuse to invent a wrongful birth claim in this Commonwealth.

III. THE SEPARATION OF POWERS DOCTRINE REQUIRES THAT THIS COURT NOT RECOGNIZE CLAIMS FOR WRONGFUL LIFE OR WRONGFUL BIRTH

Articles 27 and 28 of the Kentucky Constitution require that each coordinate branch of the government of this Commonwealth exercise only that power which has been granted it. The law is well-settled in Kentucky that courts are the interpreters of the law, not its makers. *Gathright v. H.M. Byllesby & Co.*, Ky., 157 S.W. 45 (1913). This principle was applied directly to the claimed causes of action in this case over fifteen years ago.

The establishment of a cause of action based on the matter of wrongful conception, wrongful life or wrongful birth is clearly within the purview of the legislature only. The enunciation of public policy is the domain of the General Assembly. We do not propose to invade their jurisdiction in any respect. The courts interpret the law. They do not enact legislation.

Schork, 648 S.W.2d at 863. This, of course, remains true today. The Court of Appeals' attempt to circumvent the separation of powers mandate in this case, by means of applying "traditional" tort principles, has been refuted herein and by numerous other court decisions. *See, e.g., Azzolino*, 337 N.E.2d at 537; *Abelson*, 398 S.E.2d at 563; *Taylor*, 600 N.W.2d at 684. The recognition of wrongful life and wrongful birth claims should not be done — nay, cannot be done as a matter of Kentucky constitutional law — through the ukase of this Court. The Court of Appeals' decision respecting wrongful birth must be reversed, and the decision respecting wrongful life should be affirmed, although based a different *ratio decidendi*.

CONCLUSION

We would all do well to remember the admonition written by the philosopher George Santayana, in the foreword to *Rise and Fall of the Third Reich*, wherein he was attempting to remind all of us blessed with the responsibility in the legal process: "Those who do not remember the past, are condemned to relive it." Amici curiae, Catholics United for Life, Northern Kentucky Right to Life, Kentucky Coalition for Life, and the American Center for Law and Justice-Midwest respectfully request that this Court reverse in part, and affirm in part, the holding of the Court of Appeals.

Respectfully Submitted,

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