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Do You Hear the People Sing? Balancing Parental Authority and a Child's Right to Thrive: The Cochlear Implant Debate

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I. Introduction:

Between two and three out of every one thousand children in the United States will be born deaf or hard of hearing.[1] Cochlear implant surgery can significantly improve the hearing of prelingually deaf children.[2] Cochlear implants are not a cure for deafness, they will not restore hearing to "normal" levels, but they can significantly improve the recipient's quality of life.[3] Medical professionals view implantation as early

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[1] National Institute on Deafness and other Communication Disorders (NIDCD), *Quick Statistics*, http://www.nidcd.nih.gov/health/statistics/quick.htm (last visited Nov. 10, 2009). The NIDCD also estimates that nine in ten children who are born deaf or hard of hearing have parents who can hear. *Id.* The inability to hear prior to the development of speech and language skills is defined as prelingual deafness. Stedman's Medical Dictionary (27th ed., Lippincott Williams & Wilkins 2000), *available at* http://www.medilexicon.com/medicaldictionary.php (type prelingual deafness into the search bar).

[2] U.S. Food & Drug Admin., Center for Devices and Radiological Health, http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/ImplantsandProsthetics/CochlearImplants/ucm062823.htm (last visited Nov. 10, 2009). Cochlear implants are still a relatively new technology, first approved for commercial use in the mid 1980s. *Id.* These devices are distinctly different from hearing aids and are used only for individuals with severe or profound hearing loss. *Id.*

[3] U.S. Food & Drug Admin., *Benefits and Risks of Cochlear Implants* http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/ImplantsandProsthetics/CochlearImplants/ucm062843.htm (last visited Nov. 10, 2009). Results can vary from achieving near normal hearing to no improvements in hearing. *Id.* Like any surgical procedure there are risks during and after surgery. *Id.* Individuals receiving cochlear implants do require extensive follow up and training on how to use the device most efficiently. U.S. Food & Drug Admin., *Before, During & After Implant Surgery* http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/ImplantsandProsthetics/CochlearImplants/ucm062899.htm (last visited Nov. 10, 2009).

as possible as a critical factor in the success of cochlear implant surgery.[4] While it is easy to presume that cochlear implants would be regarded by those in the deaf community as a welcome technological advancement, this is often not the case.[5] Somewhat surprisingly, there is a major subset within the deaf community that strongly opposes cochlear implants based on philosophical grounds.

This note will examine the legal issues surrounding cochlear implants. In cases where parents do not wish to have their young children fitted with cochlear implants, society may have a more important interest in compelling surgery; however, such an action would have significant legal and practical concerns. Alternatively, state legislatures could create a legal cause of action for these children, once they reach the age of majority, to sue their parents for economic loss. This article will address the legal support for limiting parental rights in the best interest of the child as well as the development of both cochlear implant technology and the Deaf Culture movement. I will analyze this sometimes heated debate and ultimately argue for a new statutory right, tolling until the age of majority, for children who would have been appropriate candidates for cochlear implants to sue their parents for making a choice contrary to the best interests of the child.

II. Parental Autonomy and Constitutional Rights

The importance of the familial unit is widely accepted as a central theme of American culture.[6] This principle has been accepted by courts and afforded substantial

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[4] Amy E. Nevala, *Not Everyone is Sold on the Cochlear Implant*, SEATTLE POST INTELLIGENCER, Sept. 28, 2000, at E5, *available at* http://seattlepi.nwsource.com/lifestyle/cont28.shtml (last visited Nov. 10, 2009). *See also* Mark Levenson MD FACS, *Cochlear Implants*, http://www.earsurgery.org/site/pages/surgery/cochlear-implants.php (last visited Nov. 10, 2009). Dr. Levenson explains that the neural plasticity of children allows the greatest success for devices implanted prior to age two. *Id.* It is believed that children with prelingual deafness who are fitted for cochlear implants later will be less successful because the necessary neural plasticity has ceased. *Id.*

[5] Nevala, *supra* note 4. There are some in the Deaf Culture movement who refer to cochlear implants as genocide. Amy E. Nevala, *Not Everyone is Sold on the Cochlear Implant*, SEATTLE POST INTELLIGENCER, Sept. 28, 2000 at E5, *available at* http://seattlepi.nwsource.com/lifestyle/cont28.shtml (last visited Nov. 10, 2009). Many of these individuals do not acknowledge deafness as a disability but rather a cultural difference akin to use of a foreign language. *Id.* Interestingly, the sign for a cochlear implant among the deaf community at large is a snake bite placed behind the ear. The ASL-Cochlear Implant Community, http://aslci.blogspot.com/2008/04/what-are-your-thoughts.html?showComment=1207598220000 (last visited Nov. 10, 2009).

[6] *See* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). The Court further articulated that the

Constitutional protection.[7] However, parental authority is not absolute and can be interfered with in certain situations to protect the best interests of the child.[8] Even the free exercise of religion may be limited if practices associated with that free exercise would cause significant harm to a child.[9] It is well established that courts may compel

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primacy of parents in child rearing is a well settled precept of American tradition. *Id. See also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Americans generally believe there is an intrinsic value to the family that exceeds matters within the ken of governmental interests. Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1834 (1995).

[7] *See* Meyer v. Nebraska, 262 U.S. 390, 401 (1923). Here the Court explicitly found that the Due Process Clause of the 14th Amendment protected parental liberty interest in raising their children free from restraint by the State. *Id. See* U.S. CONST. amend. XIV, § 2. Subsequent to *Meyer*, the Court has firmly established parental authority as a Constitutional right. *See, e.g.* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing *Meyer* in finding parental liberty interest in Due Process Clause); Quilloin v. Walcott 434 U.S. 246, 255 (1978) (addressing the many occasions on which the Court has held parental liberty interest a Constitutionally protected right); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (stating obviousness of supremacy of parental rights over those not Constitutionally protected); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (affirming liberty interest of parents in directing education and upbringing of children). Additionally, Justice Scalia has found this parental right in both the unalienable rights mentioned in the Declaration of Independence and the 9th Amendment. *See* Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting); *see also* U.S. CONST. amend. IX.

[8] *See* Prince v. Massachusetts, 321 U.S. at 170. The Court stated "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Id.* Children, the Court said, must be free to make these decisions for themselves once they reach the age of majority. *Id. Prince* involved a mother using her child to sell magazines on the street against state child labor laws; she relied in part on parental rights and the Due Process clause for her argumentation. *Id.* at 163-64. *See also* State v. Perricone, 37 N.J. 463, 474 (N.J. 1962) (explaining that utilitarian interests may, in the right circumstances, supersede personal freedoms). Courts have defined parental duty to child as an affirmative, rather than passive, duty. *Cf. In re* J.L.C., 837 A.2d. 1247, 1249 (Pa. Super. Ct. 2003) (asserting parent must provide love, protection and support to a child and be actively involved in child's life). When the life of a child is put in significant peril by a parent refusing a surgical procedure, the state may exercise parens patriae power and compel treatment in the best interest of the child. *See* State v. Perricone 37 N.J. at 474.

[9] *See* Prince v. Massachusetts, 321 U.S. at 166. A lot of the case law in the area of compelled medical treatment against parental wishes based on religious belief has dealt with Jehovah's Witnesses. *See* State v. Perricone, 37 N.J. at 469 (setting forth religious objection to life-sustaining blood transfusions for infant); *see also* Jehovah's Witnesses v. King County Hosp., 278 F.Supp 488, 504-05 (W.D. Wash. 1967) (holding *Prince* provided foundation for protecting child's interest over parental religious conviction); *In re* Karwath, 199 N.W.2d 147, 149 (Iowa 1972) (determining father's nebulous religious objections to essential medical treatment were overcome by state interest); Custody of a Minor, 379 N.E.2d. 1053, 1064 (Mass. 1978) (preventing parents from terminating life-sustaining chemotherapy due to fears of side-effects).

treatment for children in life threatening situations over parental objections.[10] Furthermore, courts may even compel non-life saving surgery over the wishes of parents.[11]

A court must weigh several factors in balancing the best interests of the child and state interest with parental objections to surgery. Factors include the proposed treatment's likelihood of success, the risks posed by that treatment and the potential outcome if no treatment is provided.[12] Generally the court will weigh the risk of doing nothing against the likelihood of success and possible risks associated with the proposed treatment and determine which course of action is in the best interests of the child.[13] Every state has different statutory guidelines for precise weighing of competing interests.

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[10] *See e.g.,* Custody of a Minor, 379 N.E.2d. at 1064; Perricone, 37 N.J. at 474; *In re* Eric B., 235 Cal.Rptr. 22, 26 (App. Ct. 1987).

[11] *See In re* Karwath, 199 N.W.2d at 150 (ordering tonsillectomy and adenoid removal to restore and preserve health of minor children); *see also In re* Sampson 317 N.Y.S.2d 641, 652 (Fam.Ct. 1970), aff'd, 323 N.Y.S.2d 253 (N.Y. App. Div 1971) *aff'd*, 278 N.E.2d 918 (N.Y. 1972) (holding child's right to live without physical deformity supersedes parental objection to blood transfusion for purpose of surgery to correct deformity). *See generally* Jay M. Zitter, *Power of Court or Other Public Agency to Order Medical Treatment Over Parental Religious Objections for Child Whose Life is Not Immediately Endangered*, 21 A.L.R.5th 248 (1994). Even in cases where surgery was not ordered courts have recognized that the condition need not be life threatening in order to justify compelling the procedure over parental objection. *See In re* Seiferth, 127 N.E.2d 820, 822 (N.Y. 1955) (affirming lower court ruling prohibiting surgery because fourteen year old child did not want it court state surgery would have been compelled if only parent objected).

[12] *See* Custody of a Minor, 379 N.E.2d at 1063. The court upheld a lower court ruling by first addressing the tripartite interests of parent, child and state and then proceeded to lay out in detail the four decisive factors as they saw it: the child suffered from life threatening leukemia, chemotherapy was the only medically viable cure, the risks to the child were minimal in contrast to death and finally the parents refused to continue the essential treatment. *Id. See also* Elizabeth Sher, *Choosing For Children: Adjudicating Medical Care Disputes Between Parents and the State*, 58 N.Y.U. L. REV. 157, 186-93 (1983) (outlining the best-interest standard in medical treatment cases). Specifically, Sher addresses the child's condition in relation to state interest. *See id.* at 186-88. She develops this prong by arguing the seriousness of the condition, whether the condition can be effectively treated and the effect of the condition over time must be considered. *Id.* Sher then moves to her second prong, the nature of the parental objection, by demonstrating that the more plausible and solidly rooted the parental objection the more weight a court should place on parental rights. *Id.* at 188-91. Lastly, she proposes courts examine the alternative proposed by parents (assuming one is offered) and weigh that substantially in favor of the parents if it can be supported by reasonable medical authority and completely devoid of medical support. *Id.* at 191-93. Debate about cochlear implantation occurs from birth to about five years old, therefore the rights that accrue to children as they reach a more mature age or are emancipated is largely irrelevant to this discussion.

[13] *See generally id.*

In Arizona, for example, the relevant statute largely prevents the state from interfering with parental autonomy.[14] On the other end of the spectrum, states like Massachusetts, New Jersey, and California afford courts greater latitude to interfere with the parents' autonomy in order to preserve what those courts perceive to be the best interests of the child.[15] Because cochlear implants are a relatively new technology there is very little case law on the subject. What does exist, however, may provide some insight into the direction courts will head on the issue.[16] Though no direct corollary exists, recent decisions regarding state mandated newborn disease screening and child vaccination may be indicative of current trends in this area.[17]

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[14] *See* ARIZ. REV. STAT. ANN. § 8-531 (2003). Arizona courts have interpreted this statute with great reverence for the supremacy of parental rights over medical treatment. *See* Diana H. v. Rubin, 171 P.3d 200, 26 (Ariz. Ct. App. 2007) (statue references the welfare of children generally, there is no specific reference to cochlear implant surgery).

[15] MASS. GEN. LAWS ch. 119, § 1 (2008). The Massachusetts statute in place today is in substance and spirit virtually identical to the statute used by the Supreme Judicial Court when they decided *Custody of a Minor*. *See* Custody of a Minor, 379 N.E.2d. at 1063; *see also* N.J. STAT. ANN. §§ 9:2-9 (West 2008); CAL. WELF. & INST. CODE § 300 (West 2005) (providing additional examples of relevant state statutes).

[16] *See* In the Interest of K.S., 512 N.W.2d 817, 820 (Iowa Ct. App. 1993). In this case, the appellate court affirmed the lower court's decision to terminate parental rights. *See id.* The court reasoned that where a credible record of parental abuse existed and where placing the child in foster care would best facilitate successful cochlear implant surgery it was in the best interest of the child to terminate parental rights. *See id.* An Indiana appellate court upheld a trial court decision to remove primary custody from a mother who refused to allow her children access to hearing aids (including cochlear implants) and exposure to hearing children due to her ardent support of the Deaf Culture movement. *See* Winkler v. Winkler, 689 N.E.2d. 447, 450-451 (Ind. Ct. App 1997). The father, who wished to provide the needed medical treatment and integrate his children into the hearing world, was awarded primary custody. *See id. But see* Jenny Desai, *Falling on Deaf Ears*, SCI. & SPIRIT, *available at* http://www.science-spirit.org/article_detail.php?article_id=467&pager=0. Ms. Desai cites an unreported Michigan case in 2002 that created an outcry in the Deaf Culture community when the local district attorney, based on recommendation of court appointed *guardian ad litem*, brought child neglect charges against a mother who refused to provide her two deaf children with access to cochlear implants. *See id.*

[17] *See* Spiering v. Heineman, 448 F. Supp. 2d 1129, 1139-41 (D. Neb. 2006). The *Spiering* court upheld a Nebraska law requiring screening of newborns for certain health defects. *Id.* Parents raised a religious objection to the statute and alleged it violated their First and Fourteenth Amendment rights; however, the court rejected these arguments in favor of protecting both public interest and best interests of the child in having disability treated as early as possible. *Id.* In addressing the societal interest, the court specifically mentioned the financial burden to society of raising these children should the disability go untreated as a significant aspect of the legitimate legislative purpose. *Id.* Further, the court explained that any evaluation of such Fourteenth Amendment claims by parents should be evaluated using a rational basis test rather than strict scrutiny, this would be relevant in any evaluating any newly proposed legislative statute in this note. *Id.*

The Deaf Culture Movement

Many deaf individuals identify with the relatively new "Deaf Culture" movement.[18] This movement rejects the label of deafness as a disability and instead views deafness as a unique cultural subset.[19] By way of illustration, one leading deaf linguist wrote: "the term 'disability' describes those who are blind or physically handicapped, not Deaf people."[20] This view alleges that any disadvantages of being deaf are due to societal constructs. They argue that a mere reordering of societal norms, such as tele-text machines replacing telephones, required sign language education for all children, would solve many of the perceived disadvantages of deafness.[21] Further, the Deaf Culture movement rejects hearing as a function of the normal human condition; rather, they include deafness in the set of normal human variations and thus place deafness outside of the definition of disability.[22] However, such cultural perspectives

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[18] Edward Dolnick, *Deafness as Culture*, ATLANTIC MONTHLY 37, 37-38 (Sept. 1993), *available at* http://signlanguageresourcesinc.com/deafculture.htm. The Deaf Culture movement is very confusing to many in the hearing world who are not able to comprehend the rationality of thinking of deafness as akin to ethnicity. *Id.* at 38. *See also* Amy Elizabeth Brusky, *Making Decisions for Deaf Children Regarding Cochlear Implants: The Legal Ramifications of Recognizing Deafness as a Culture Rather Than a Disability*, 1995 WIS. L. REV. 235, 235 (1995). Brusky explains that ever since the FDA allowed children age two or older to undergo cochlear implant surgery a bitter debate has raged between hearing parents along with medical professionals and the Deaf Culture movement. *Id.* Many in the Deaf Culture movement resent the position that they need to be "fixed." *See* Robert L. Burgdorf Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. ON C.L. & C.R. 241, 324 (2008). The Deaf Culture movement may be best described as an activist approach with a political agenda that centers on redefining deafness and changing societal attitudes. *See* Anna-Miria Muhlke, *The Right to Language and Linguistic Development: Deafness From a Human Rights Perspective*, 40 VA. J. INT'L L. 705, 722 (2000).

[19] *See* Brusky, *supra* note 18, at 240; *see also* Robert Sparrow, *Defending Deaf Culture: The Case of Cochlear Implants*, *in* 13 THE JOURNAL OF POLITICAL PHILOSOPHY 135, 137 (2005). Sparrow explains that some in the Deaf culture movement are so strong in their belief that deafness is a cultural way of life they seek genetic counseling to attempt to ensure their children will be born deaf. *Id.* The large D Deaf is used by those in the Deaf culture movement to convey membership in a cultural minority whereas those who are deaf, lower cased, view themselves as hearing impaired but largely integrated within the hearing world. Bonnie Poitras Tucker, *The ADA and Deaf Culture: Contrasting Precepts, Conflicting Results*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 31 (1997).

[20] *See* Dolnick, *supra* note 18, at 37. Some advocates argue that because deafness has developed its own culture and language those characteristics make deafness a linguistic minority and not a disability. Kathryn Ivers, *Towards a Bilingual Education Policy in the Mainstreaming of Deaf Children*, 26 COLUM. HUM. RTS. L. REV. 439, 442 (1995).

[21] *See* Sparrow, *supra* note 19, at 137.

[22] *See id.*

generally do not exist in other disabled communities like the blind community.[23] What appears to set Deaf Culture apart is the fundamental difference in the nature of interpersonal communication via American Sign Language (ASL) versus oral communication.[24] The inherent connection between a shared language and shared culture exists not only in the deaf community but in virtually every linguistic minority within a larger society.[25] This difference in language is a significant component of the cochlear implant debate.[26]

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[23] *See* Barbara Pierce, *No Such Thing as Blind Culture*, BRAILLE MONITOR, (Nov. 2008), *available at* http://www.nfb.org/images/nfb/Publications/bm/bm08/bm0810/bm081007.htm (last visited Nov. 10, 2009). In response to an inquiry about blind culture the president of the Ohio National Federation for the Blind (NFB) explained that, unlike deafness, blindness does not require a unique language; thus blind individuals are more able to communicate and integrate into the larger society. *Id.* Pierce further explains that blind people do not live in insular groups nor do they share a common political outlook or religious affiliation thus it can be called a "culture" in the truest sense. *Id.* Finally she notes that while there are blind organizations set up to advocate for the rights of blind individuals against discrimination, such community based organizations do not equate to a "culture" as the deaf community labels itself. *Id.*

[24] *See* Sparrow, *supra* note 19, at 140. ASL has a unique syntax, grammar and even vocabulary. *Id. See also* Tucker, *supra* note 19, at 31. Dolnick explains that ASL is viewed as the natural language of the deaf, he goes on to claim that deaf children of deaf parents pick up ASL as easily as the average hearing child picks up spoken language. *See also* Dolnick, *supra* note 18, at 40.

[25] *See* Josiane Deschamps Abel, Comment, *Language, Nationality and the Law: What Lies Ahead for America?* 34 U. MIAMI INTER-AM. L. REV. 343, 345-46 (2003). Linguistic minorities express themselves in unique ways derived from their cultural identity; differences in language and meaning can pose a challenge to open political dialogue if not accepted and embraced. *See* Cristina M. Rodriguez, *Accommodating Linguistic Difference: Toward A Comprehensive Theory of Language Rights in the United States,* 36 HARV. C.R.-C.L. L. REV. 133, 156 (2001). It has also been expressed that a refusal to learn English, by those otherwise capable of doing so, purposefully leaves those individuals isolated from the predominate culture. *See* Robert L. Lamborn, Comment, *The Fiber of the Common Bond,* 13 GEO. MASON L. REV. 367, 368 (2005). Lamborn argues despite the United States not having an official language, those who do not speak or understand English are disenfranchised by American culture. *Id. See generally* Natalie Prescott, *English Only at Work, Por Favor,* 9 U. PA. J. LAB. & EMP. L. 445 (2007) (articulating that English only policies in workplace are not only practical but serve the interests of employer, public, and even employee).

[26] Sparrow, *supra* note 19, at 140-41. Sparrow develops the argument that hearing persons, even if they know sign language, can never truly be a part of Deaf culture because of the lack of shared experiences. *Id.* The logical extension of this argument would then be that deaf children, who regain some ability to hear via cochlear implants, may also be isolated from their Deaf parents by ceasing to be a part of Deaf culture. *Id.* There is no clear right answer on the best method of linguistic development for every deaf child, it will vary depending on abilities. *See* Dolnick, *supra* note 18, at 47-48. The Deaf culture movement vehemently opposes cochlear implants in children and instead supports special segregated schools to teach ASL and develop Deaf culture in children. *See* Tucker, *supra* note 19, at 33.

There is a feeling in the Deaf Culture movement that cochlear implants will lead to a weakening, and potential elimination, of Deaf Culture.[27] Because Deaf Culture views deafness as a birthright they perceive cochlear implants as actively depriving congenitally deaf children of that privilege and resent the idea that surgery would be used to correct deafness, this position is similar to racial or ethnic minorities who would oppose "correcting" distinctive features typically associated with those groups.[28] It should be noted that the Deaf Culture movement, while not encompassing the entirety of the deaf community, does speak for a significant portion of the 500,000 Americans who communicate through American Sign Language users of American Sign Language are more likely to associate with the Deaf Culture movement and thus provide some indication of the number of people who identify with the Deaf Culture movement, however, no precise number is available.[29] Another possible indicator of the reach of Deaf Culture is that each year in America there are 1,200 deaf children born to deaf parents: many of these children are viable candidates for cochlear implants, yet only a

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[27] *See* Brusky, *supra* note 18, at 240. It is common for Deaf culture advocates to refer to cochlear implants using terms like "genocide," "child abuse" or even comparing the technology to experiments performed during the Nazi regime. *Id.* at 241-42. Harlan Lane, a leading linguist and controversial activist for the Deaf Culture movement, argues that medical experts are inappropriate resources to assist parents in determining what is best for deaf children; rather, the eighty-six percent of Deaf adults who would not accept a cochlear implant even if it were free are the more legitimate information source for these parents. *See* Dolnick, *supra* note 18, at 43. If one accepts Deaf culture as a valuable and unique cultural entity it is possible that continued technological developments, including cochlear implants, may eventually cause such large numbers of children to be able to hear that Deaf culture will die out. *See* Sparrow, *supra* note 19, at 141.

[28] *See* Dolnick, *supra* note 18, at 43 (demonstrating Deaf culture finds medical intervention to remedy deafness both inappropriate and offensive); *see also* Nevala, *supra* note 4, at E5 (quoting Deaf culture advocate who feels cochlear implants make deaf children into something they are not). Dr. Lane believes that when parents provide their children with cochlear implants they are actively depriving that child of the gift of deafness. *See* Brusky, *supra* note 18, at 242. While the approach of the Deaf Culture community to the issue has been to call for a collective set of rights for the deaf community, it should be noted that such a collectivist approach contrasts sharply with the current approach to minority rights in international law. *See generally* Maya Sabatello, *Disability, Cultural Minorities, and International Law: Reconsidering the Case of the Deaf Community*, 26 WHITTIER L. REV. 1025 (2005). Sabatello explains that the Deaf culture movement seeks to be collective arbiter of what is right and appropriate for deaf children in an effort to protect their perception of the cultural identity of Deafness. *Id.* at 1029. According to Sabatello, neither the United Nations Declaration on Human Rights nor Article 27 of the International Covenant on Civil and Political Rights take such a collective approach, but rather, they advocate a more individualist centered approach to cultural rights. *See id.* at 1034.

[29] *See* Gallaudet Research Institute (GRI), *Current Estimates (2004): How Many Deaf People Are There in the U.S.?*, http://gri.gallaudet.edu/Demographics/deaf-US.php (last visited Nov. 10, 2009) (stating that no good survey exists to pinpoint the number of people who identify as Deaf).

small percentage actually undergo the surgery.[30]

The Science Of Cochlear Implants

While cochlear implants as a unique device were only developed some thirty or forty years ago, the underlying electro-stimulation of the auditory system dates back to the 1880s.[31] Cochlear implants were first developed in Australia in the late 1970s and it was during this time period the first trials for effectiveness and safety of cochlear implants took place.[32] In 1985, the first cochlear implants were approved for use in the United States.[33] The United States Food and Drug Administration ("FDA") has issued strict guidelines about who is a suitable candidate for cochlear implant surgery and at what age surgery may be performed.[34] Only children aged twelve months or older with severe to profound deafness in both ears and for whom hearing aids would not be an effective remedy are permissible candidates.[35] There are two main components to a cochlear implant: an external speech processor and the internal implant itself.[36] The external device sends signals to the implanted component, which includes a wire inserted directly into the cochlea of the ear. The electrodes in this wire directly stimulate the hearing nerve through a precise pattern.[37] The implant surgery itself is an intricate but relatively safe procedure.[38]

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[30] *See* NIDCD, *supra* note 1. While no accurate reporting of this exact figure exists using US birth rate, combined with the rate of babies born with severe to profound hearing loss and then using the statistic that 90% of these children are born to hearing parents you arrive at 1,200 annually born to deaf parents.

[31] *See* American Speech-Language Hearing Association (ASHA), *A Brief History of Cochlear Implants*, http://www.asha.org/docs/html/TR2004-00041.html#sec1.2 (last visited Nov. 10, 2009) (describing very first electrically based auditory stimulation).

[32] *See* Lynne Alix Morrison, Note, *Guidelines for Informed Decision Making Governing Cochlear Implants in Minors,* 1 J. HEALTH & BIOMEDICAL L. 111, 113 (2005).

[33] *See id.* In 1990, the FDA approved cochlear implants for children. *See* JOHN K. NIPARKO MD., KIDS AND COCHLEAR IMPLANTS: GETTING CONNECTED 3 (2001), *available at* http://www.ag bell.org/Docs/kids_cochlear.pdf.

[34] *See* Ear & Hearing Center (EHC) at Cincinnati Children's Hospital Medical Center, *Cochlear Implant*, http://www.chdr.org/CochlearImplant.html (last visited Nov. 10, 2009).

[35] *Id. See also* Morrison, *supra* note 32 at 114-15.

[36] *See* Morrison, *supra* note 32, at 113-14; *see also* EHC, *supra* note 34. Recent developments by the three main suppliers of cochlear implants have led to major advances in the technology used in the transmitter and processor. *See* EHC, *supra* note 34; *see also* Tucker, *supra* note 19, at 32.

[37] *See* Tucker, *supra* note 19, at 32.

[38] *See* EHC, *supra* note 34; *see also* U.S. Food & Drug Admin., *supra* note 3.

Approximately four to six weeks after surgery, the processor will be activated and the "mapping" process can begin; in this process each electrode in the array is programmed for optimal success, unique to each individual.[39] Following the mapping process extensive rehabilitation is critical to the ultimate success of the implant.[40] Depending upon the recipient, the rehabilitation may be frequent (weekly) or more sporadic (every two to three months) and will entail development of hearing skills, speech and language skills, and occasionally, re-mapping the electrode array to get the best results.[41] This is not an easy process and should not be undertaken lightly but if the protocols are followed there is excellent potential for the recipient to have functional hearing in the implanted ear where none existed before.[42]

The Relative Cost of Cochlear Implants

Most major health insurance companies in the United States, as well as Medicare and Medicaid, cover cochlear implant surgery.[43] Cochlear implants, when not covered by a government program, private health insurance or alternative funding source, can range anywhere from $50,000 to $100,000 for surgery and required follow up.[44] By contrast, according to studies by two leading American universities, the average cost to society of providing for a child with pre-lingual profound deafness will exceed

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[39] *See* DEBRA NUSSBAUM, COCHLEAR IMPLANTS: NAVIGATING A FOREST OF INFORMATION . . . ONE TREE AT A TIME 32 (2003), http://clerccenter.gallaudet.edu/Documents/Clerc/CI-K.pdf.; *see also* EHC, *supra* note 34.

[40] *See* EHC, *supra* note 34.

[41] *See id. See also* NUSSBAUM, *supra* note 39, at 33.

[42] *See* Tucker, *supra* note 19, at 33-4; *see also* U.S. Food & Drug Admin., *supra* note 3.

[43] *See* Steven Garber et al., *Payment Under Public and Private Insurance and Access to Cochlear Implants*, 128 ARCHIVES OTOLARYNGOLOGY—HEAD & NECK SURGERY 1145, 1150 (2002); *see also* Coverage and Payment for Cochlear Implants, *Why does Health Insurance Pay for Cochlear Implants?*, http://www.cochlear.org/sys-tmpl/door/ (last visited Nov. 10, 2009) (estimating that 71% of all candidates for cochlear implants qualify for government assistance for the procedure). In addition to conventional resources or paying out-of-pocket there are numerous private sources of funding devoted to helping individuals afford cochlear implants. *See* Listen-up.org, *Sources of Hearing Aid and Cochlear Implant Funding*, http://www.listen-up.org/haidfund.htm#oth (last visited Nov. 10, 2009). Some states have recently passed laws requiring health insurance companies to cover the cost of cochlear implants for children. Susan Boswell, *Wisconsin Passes Insurance Mandate*, July 14, 2009, http://www.asha.org/publications/leader/archives/2009/090714/090714a.htm.

[44] *See* Fan-Gang Zeng, *Cochlear Implants: Why Don't More People Use Them?*, 60.3 HEARING J. 48, 49 (2007), *available at* http://www.audiologyonline.com/theHearingJournal/pdfs/hj2007_03_p48-49.pdf (even when government programs do help cover the cost of the implant, the procedure is still prohibitively expensive for most where Medicare only covers $20,000 of a potentially $100,000 procedure).

one million dollars over the course of that child's lifetime.[45]

In concrete terms it costs at least ten times as much, on an annual basis, to educate a deaf child in a residential school for the deaf, than it does to educate that same student in a mainstream classroom.[46] One study published in the Official Journal of the American Academy of Pediatrics found that early intervention in pre-lingually deaf children would result in a savings to society of $430,000 over the course of that child's lifetime.[47] With regard to employment prospects, that same study indicated that the cost to society of a deaf individual's lost productivity and the expense of vocational rehabilitation are each at least four times greater without early intervention.[48]

Current figures put the national unemployment rate at 10.2% as of October 2009.[49] In the deaf community unemployment rates are currently around 42% with an additional 18% severely underemployed.[50] Additionally, the deaf population has statistically a much lower functional education and reading level.[51] Because cochlear implants are still a relatively new technology there is, as of yet, no good measure of the unemployment rate among cochlear implant recipients; however, due to the increased communications skills gained via cochlear implants, it is reasonable to expect that the

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[45] *See* Coverage and Payment for Cochlear Implants, *supra* note 43 (cost comparison between providing children with assistance for obtaining cochlear implants versus providing for children with pre-lingual deafness during their lifetime).

[46] *See* Tucker, *supra* note 19, at 33. It is also important to consider that the cost of ADA mandated interpreter services ranges from $20 to $40 per hour. Bonnie Poitras Tucker, *The ADA and Deaf Culture: Contrasting Precepts, Conflicting Results*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 31 (1997). Extrapolating from that figure, a child in a 6 hour a day educational setting for 180 school days per year will cost anywhere from $21,600 to $43,200 annually. *Id.*

[47] *See* Ron Keren et al., *Projected Cost-Effectiveness of Statewide Universal Newborn Hearing Screening*, 110.5 PEDIATRICS 855 (2002) *available at* http://pediatrics.aappublications.org/cgi/content/full/110/5/855 (societal costs include 75% decrease in lost productivity, 10% decrease in special education needs, and a 75% decrease in vocational rehabilitation needs, which authors equate to a $430,000 savings per deaf individual that was universally screened as an infant).

[48] *See id.* at 858.

[49] *See* U.S. DEP'T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, http://www.bls.gov/cps/ (last visited Nov. 10, 2009).

[50] *See* Dallas Otolaryngology Associates Cochlear Implant Program, *Facts and Myths Regarding Deafness*, http://cochlearimplants.dallasoto.com/facts/deaf_facts.html (last visited Nov. 10, 2009). Those deaf individuals who are fully employed still only earn half to three quarters of their non-deaf counterparts. *Id.* More than half of the employed deaf population earns $25,000 or less. *Id.*

[51] *See id.* Only 5% of the deaf population graduates from college. *Id.* The vast majority of deaf students are educated in deaf educational settings, and these students graduate with an average third grade reading level. *Id.* Seventy-five percent of deaf students fail to graduate college. *Id.*

unemployment rate of cochlear implant recipients is lower than that of the larger deaf population.[52] Indeed, a successful Cochlear Implant recipient is generally no longer defined as "severely disabled" for the purposes of Supplemental Social Security Disability Income or the Department of Labor thus we can infer that these governmental agencies view that individual's employment prospects as greatly improved from the pre-implant state.[53]

III. Court Compelled Cochlear Implant Surgery.

As explained above, our courts have historically been wary of any state action which infringes on the autonomy of the family unit.[54] Compelling surgery for children whose parents object to cochlear implants may significantly interfere with the parent-child relationship society strives to protect.[55] Assuming the parents beliefs are real and sincerely held,[56] there is a legitimate argument to be made that invalidating these genuine cultural values via judicial fiat injures not only the individual family impacted by the ruling but, in a larger sense, weakens the rights of all parents to determine the best interests of their children.[57] The instances where courts have compelled surgery in non-life-threatening situations are rare and done only after serious deliberation as in the case of *In re Karwath* where the court compelled routine tonsil and adenoid removal surgery over parental objections.[58] Creating an over-arching policy of compelling cochlear

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[52] *See generally* J.P. Harris et al.; *An outcome study of cochlear implants in deaf patients*, 121 ARCHIVES OF OTOLOARYNGOLOGY HEAD AND NECK SURGERY 398 (1995).

[53] *See* Patricia Digh, *Finding New Talent in a Tight Market*, ASAE & THE CENTER FOR ASS'N LEADERSHIP 2001, http://www.asaecenter.org/PublicationsResources/whitepaperdetail.cfm?ItemNumber=12173. Digh explains the unemployment rate among the severely disabled is around 74%; however, only 23% of non-severely disabled adults of working age are unemployed. *Id.*

[54] *See* Wisconsin v. Yoder, 406 U.S. at 232; *see also* Prince v. Massachusetts, 321 U.S. at 166. The exercise of parental authority provides an essential buffer to the state dictating values and beliefs to children. *See* Dailey, *supra* note 6, at 1857.

[55] *See also* Sparrow, *supra* note 19, at 137 (explaining that many in the Deaf culture movement do not want hearing children because they are afraid they will not be able to communicate with them). In situations such as this, it is a logical inference that compelling surgery may create a barrier between parent and child. *Id.* Moreover, these same parents often have very strong views on how their children should be educated and oppose mainstream schools, so if cochlear implant surgery is successful and children are integrated into mainstream education, these parents may be angry that their children have forsaken their natural way of life. *See* Tucker, *supra* note 19, at 33.

[56] *See* Dolnick, *supra* note 18, at 37-38.

[57] *See* Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (holding Due Process Clause protects all parental authority over children from state intervention). Illustrating this point, courts have been unwilling to impose cultural norms on families who object to post-natal circumcision. *Id.*

[58] *In re* Karwath, 199 N.W.2d 147, 150 (Iowa 1972) (ordering tonsillectomy and adenoid removal

implant surgery may not only be unfeasible: it would mark a significant departure from American jurisprudence.[59]

The other major barrier to compelling this surgery in particular is the absolutely essential follow up care that is needed for success.[60] Ultimately, while the state may be able to oversee the needed follow-up procedures, merely involving the state may not be adequate.[61] If parents who are forced to subject their children to cochlear implant surgery are not deeply committed to the mapping process and related therapies the odds for success will be significantly reduced.[62] The follow-up process for implant recipients is hard on children and their families because it is lengthy, can be emotionally and physically draining and requires continued exposure to auditory stimulation.[63] If parents are not engaged in and supportive of the process, it will compromise the chances of success and likely leave children with ineffective implants.[64] Some children could even be left worse off than they were before surgery because once implanted, a cochlear implant cannot be removed.[65]

Creation of a Statutory Right

The issue thus becomes finding the best theoretical and practical solution that adequately balances the competing interests of the affected children, their parents, and society.[66] An alternative to judicial fiat is for state legislatures to use the legal doctrine of

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to restore and preserve health of minor children). *See also In re* Sampson 317 N.Y.S.2d 641, 655-56 (N.Y. Fam. Ct. 1970), *aff'd*, 323 N.Y.S.2d 253, 255 (N.Y. App. Div. 1971), *aff'd per curiam*, 278 N.E.2d 918, 919 (N.Y. 1972) (affirming child's right to live without physical deformity trumped parental objection to blood transfusion).

[59] *See supra* notes 6-7 (and supporting text).

[60] *See* EHC, *supra* note 34 (describing difficulties following surgery); *see also* NUSSBAUM, *supra* note 39, at 3-5 (describing process for training recipient to process sounds).

[61] EHC, *supra* note 34 (describing social/family factors as most important determinant of post-op performance); *see also* U.S. Food & Drug Admin., *Before, During & After Implant Surgery* (2009), http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/ImplantsandProsthetics/CochlearImplants/ucm062899.htm (explaining complexity of follow-up process).

[62] *See* Tucker, *supra* note 19, at 32-33 (recognizing success of implant depends on continuous auditory feedback).

[63] *See* Tucker, *supra* note 19, at 33 (noting complexity of recovery).

[64] *See* EHC, *supra* note 34 (explaining vital role of family).

[65] *See* Levenson, *supra* note 4 (detailing invasive nature of procedure). *See generally* U.S. Food & Drug Admin. Center for Devices and Radiological Health, *supra* note 61 (describing post-surgery care).

[66] *See supra* notes 7-9 and accompanying text (discussing balancing tests for state intervention over parental objections).

parens patriae (that the State has the authority to intervene against a negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection) to create a new cause of action for children who, but for parental objection, would have been viable candidates for cochlear implant surgery in their pre-lingual years.[67] This statute would, for obvious reasons, have to start to toll only after the affected child reaches the age of majority.[68] At that point, the theory of recovery would be a negligence cause of action and damages would be calculated by estimating economic loss.[69] However, it is critical to keep in mind that this would be merely a right to sue, and as such, if a given child does not object to his parent's choice, the child need not pursue any course of action.[70] For children who lose the chance to benefit from a cochlear implant and who feel their parents were wrong in not pursuing the surgery, the proposed statute gives these children a legal remedy in lieu of a medical one.[71] As discussed earlier, there are three parties impacted by the parental choice not to allow their children to receive cochlear implants: the parents, the children, and society at large.[72] This section will examine the proposed legal solution from the perspective of each involved party and demonstrate why such a statutory remedy is the best possible option to handle this complex issue.

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[67] *See* BLACK'S LAW DICTIONARY 1144 (8th ed. 2004) (translating and defining parens patriae doctrine). The state is not "an adequate substitute for the judgment of a loving and nurturing parent," but may intervene when they have a compelling reason to do so. *Id.* *See also* Brusky, *supra* note 18, at 268 (providing discussion of parens patriae power and the limits thereof).

[68] *See* BLACK'S LAW DICTIONARY 1525 (8th ed. 2004) (providing legal definition of toll as "[t]o suspend or stop temporarily as the statute of limitations is tolled during the defendant's absence from the jurisdiction and during the plaintiff's minority"). Black's Law further defines the age of majority as the legal age at which full rights and responsibilities are conferred upon previously minor children. *See id.* at 66.

[69] *See id.* at 1061. Black's Law defines negligence as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm. . ." *Id.*

[70] *See* Maximilian A. Grant, *The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions*, 63 U. CHI. L. REV. 239, 249-251 (1996) (demonstrating First Amendment protections have been afforded to the right to sue and, the corollary right to refrain from suit); *see also* U.S. CONST. amend. I, cl. 2.

[71] *See* Risa E. Kaufman, *Access to the Courts As a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1504 (2008) (defining right to litigate as fundamental to participatory democracy as held by Supreme Court).

[72] *See supra* notes 7-9 and supporting text (outlining competing interests of parent, child, and society).

Creating A Legal Remedy

By creating a new statutory right for the affected children, the state takes no direct action that could be said to invade the sphere of parental autonomy.[73] Instead parents are free to make the choice they believe is best for their child's future.[74] If the child chooses to subsequently challenge that choice in the courts, a fact finder will be left to determine the legitimacy of the reasons underlying the parent's decision. This legislative remedy is a way for society to guide the actions of parents without forcing them to cede their parental rights to the state.[75] It makes a statement that such actions are considered to be potentially negligent by the state.

What makes this issue so vital is that, as previously discussed in this paper, if a child is born with pre-lingual deafness, cochlear implant surgery needs to be performed as early as possible to maximize the chances of success.[76] By the time a child turns seven or eight years old, it is too late for cochlear implants to yield any measurable benefit because the neural pathways devoted to hearing have "died" and cannot be re-awakened.[77] Thus, by the time the child can legally speak for himself, cochlear implant surgery is no longer a legitimate option.[78] These children then are left with no recourse to remedy a choice their parents made years prior.

Courts protect parental autonomy in religious choices in large part because at some point the child will become an independent, capable of forming his or her own beliefs and conducting his life as he chooses, but such freedom is not possible for a child whose parents chose not to proceed with cochlear implants.[79] Those children who believe this choice has harmed them should be entitled to some measure of remedy for the irrevocable decision made by their parents.[80] If a particular child does not object to

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[73] *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-535 (1925) (explaining parental interest in method of child rearing is superior to state interest in most cases).

[74] *See id. See also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (affirming primary authority over children resides in hands of parents).

[75] *See* Brusky, *supra* note 18, at 268; Dailey, *supra* note 6, at 1856.

[76] *See* Levenson, *supra* note 4.

[77] Mark Levenson, *Cochlear Implants*, http://www.earsurgery.org/cochlear.html (last visited Nov. 10, 2009).

[78] *See id.* (noting that the FDA has approved cochlear implants in children as young as 12 months of age).

[79] *See generally* Zitter, *supra* note 11; Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1191 (2004) (illustrating cultural values are malleable within individuals; beliefs and behaviors can change over time).

[80] *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L. J. 524, 529 (2005) (arguing for the "recognition of a right,

his parent's actions he will not sue and the statute of limitations will run just as it would for any other tort.[81]

Parents so sued may wish to raise the costs and risks of Cochlear Implantation as a defense in such a trial. Some people may point to the cost of cochlear implant surgery as prohibitive. While this will become an issue to consider for the fact finder, as the facts indicate, however, there are many financing avenues for parents to pursue if they are committed to obtaining cochlear implants for their children.[82] Other than out-of-pocket funding, most heath insurance providers will pay for the implants as will Medicare/Medicaid.[83] In addition many charitable organizations will provide funding for cochlear implant surgery.[84] Nonetheless, cost may be a serious obstacle in some instances. If a child sues under the proposed statute and the trier of fact finds that financial circumstances prevented the parent from pursuing the surgery, the trier of fact could naturally take those facts into consideration when determining whether the parent was negligent.[85]

Others may be concerned with the precedent set by crafting such legislation specifically to punish parents for a legal choice they made in relation to how they raise their child.[86] Such concerns are mitigated by recognizing the unique nature of this situation.[87] It is not at all uncommon for the courts to grant legal remedies to those

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grounded in the Fourteenth Amendment Due Process Clause, to a body of law that empowers individuals to seek redress against persons who have wronged them").

[81] *See supra,* notes 56-57 and supporting text (explaining how families content with the decision not to have cochlear implants should not have their rights infringed).

[82] *See* Coverage and Payment for Cochlear Implants, *Why does Health Insurance Pay for Cochlear Implants?*, http://www.cochlear.org/sys-tmpl/door/ (last visited Nov. 10, 2009); *see also* Sources of Hearing Aid and Cochlear Implant Funding, http://www.listen-up.org/haidfund.htm#oth (last visited Nov. 10, 2009).

[83] *See* Coverage and Payment for Cochlear Implants, *Why does Health Insurance Pay for Cochlear Implants?*, http://www.cochlear.org/sys-tmpl/door/ (last visited Nov. 10, 2009) (noting that both coverage and payment have greatly improved in the past 5-7 years, as a result of understanding the costs and outcomes of cochlear implants and the application of the Americans with Disabilities Act and other laws).

[84] *See* Sources of Hearing Aid and Cochlear Implant Funding, http://www.listen-up.org/haidfund.htm#oth (last visited Nov. 10, 2009).

[85] *See supra* notes 44-45 and accompanying text.

[86] *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (addressing valid concerns of governmental overreaching by interfering with parent/child relationship). *See generally* Sher, *supra* note 12 (discussing of when the state has a right and obligation to intervene in protecting child's interest).

[87] *See* Prince v. Massachusetts, 321 U.S. 158, 170 (1944). The Prince court determined that while parents have an unambiguous right to their own belief system and may generally act in

who suffer unalterable harms due to the negligence of others.[88] Here, however, what is being argued for is an affirmative parental duty to act in order to protect the best interests of children. While creation of such an affirmative obligation may give some cause for concern, the courts have articulated this principle in the past.[89] It is incumbent upon those who might object to such a duty to recognize first that such a duty is only reasonable where there exists no subsequent ability to remedy previous parental inaction.[90] While there may be a reasonable concern that such a statute could lead to other causes of action, it is better left to legislatures to determine where to draw the line.[91] If legislatures do overstep the bounds of constitutionality, the courts, of course, provide the ultimate check on any unconstitutional statutes.[92]

The Child's Interest

If society accepts the premise that parents have a right to make the choice about whether or not their child will receive a cochlear implant it is essential then to consider what rights society preserves for the child. It is indisputable that a child with pre-lingual deafness who does not receive a cochlear implant will face a host of challenges in integrating into the hearing world.[93] As discussed above, deaf children face serious challenges in attaining a quality education in their formative years and obtaining gainful employment during adulthood.[94] Thus, even if these children do find gainful employment their options will very often be limited by their relative lack of education and continued disability.[95] The Americans with Disabilities Act ("ADA") certainly

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accordance with those beliefs even to their own detriment it is not permissible to allow those same parents to make martyrs of their children. *Id.*

[88] *Cf.* Kristen Rabe Smolensky, *Creating Children With Disabilities: Parental Tort Liability for Pre-implantation Genetic Interventions*, 60 HASTINGS L. J. 299, 321 (2008). *See also* Gibson v. Gibson, 479 P.2d 648, 653 (Cal. 1971) (determining standard of care for parental liability should be that of reasonable parent in similar situation).

[89] *See supra* note 8 and accompanying text.

[90] *See* Smolensky, *supra* note 88, at 321-23.

[91] *See* Jones v. City of Portland, 245 U.S. 217, 221 (1917) (acknowledging state legislature has primary power to decide what laws are needed in the public interest).

[92] *See* Marbury v. Madison, 5 U.S. 137, 147 (1803) (setting forth foundational principle of judicial review to determine constitutionality of statutes).

[93] *See generally* Nevala, *supra* note 4; Dolnick, *supra* note 18.

[94] *See* Dallas Otolaryngology Associates Cochlear Implant Program, *Facts and Myths Regarding Deafness*, http://cochlearimplants.dallasoto.com/facts/deaf_facts.html (last visited Nov. 10, 2009); *see also* Sparrow, *supra* note 19, at 140-41; Morrison, *supra* note 32, at 112.

[95] Dallas Otolaryngology Associates Cochlear Implant Program, *Facts and Myths Regarding Deafness*, http://cochlearimplants.dallasoto.com/facts/deaf_facts.html (last visited Nov. 10, 2009).

requires employers to offer accommodations to qualified individuals with disabilities.[96] Communicative ability is a bona fide qualification for many employment positions and if a deaf person has no such ability he or she is, by definition, not qualified and will fall outside of the protections of the ADA. There is a demonstrable economic loss these children suffer later in life attributable to a choice made by their parents.[97] Again, these parents have the right to make such a choice, but because of the irreversible nature of that choice the lives that are affected as a result the rights of the children should also be legally recognized.[98]

It is plausible that in certain situations an eligible plaintiff may not be able to recover any actual damages due to the economic situation of his parents.[99] Such recovery issues, while potentially problematic, do not in and of themselves undermine the validity of a jury declaring that the parents' choices have wronged the child. There is an intrinsic value in declaring the goals of a society and sending a message about the rights and responsibilities of parents in raising their children.[100] While no amount of money can restore functional hearing to a child deprived of cochlear implants, it may go a long way to mitigating the economic harm of such a parental choice.[101]

There probably will be some collateral damage to the familial unit as a result of enacting this legislation.[102] It is likely that an adult child could become estranged from his parents should he choose to exercise his right to sue. However that concern seems minimal given that any child who has chosen to take that step already has developed strong feelings about his parents' choices in how to raise him.

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[96] *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000).

[97] *See, e.g.,* Sparrow, *supra* note, 19 at 137 (describing jubilation of Deaf culture parents upon learning child will also be deaf); Muhlke, *supra* note 18 at 722 (defining Deaf culture movement as a political and activist ideology); Brusky, *supra* note 18, at 241-42 (providing examples of ideological language used to describe cochlear implants by Deaf culture movement).

[98] *See supra* notes 65-68 and accompanying text.

[99] Dallas Otolaryngology Associates Cochlear Implant Program, *Facts and Myths Regarding Deafness*, http://cochlearimplants.dallasoto.com/facts/deaf_facts.html (last visited Nov. 10, 2009). The economic realities of deafness mean that many deaf parents will not have the means to pay any assessed damages resulting from a finding for the plaintiff. *See id.*

[100] *Cf. In re* Seiferth, 127 N.E.2d 820, 822 (N.Y. 1955). While the issue of parental choice was moot due to child's articulated preference the court still felt there was value in defining the parental duties which had not been met here. *Id.*

[101] *See* Dallas Otolaryngology Associates Cochlear Implant Program, *Facts and Myths Regarding Deafness*, http://cochlearimplants.dallasoto.com/facts/deaf_facts.html (last visited Nov. 10, 2009) (explaining life-long economic hardship often associated with deafness).

[102] *See* Dailey, *supra* note 6, at 1834. (explaining government concern about legislation that may impact upon family unit).

Societal Interest

The economic burden of this parental choice is not borne by the deaf child alone but also places an added burden on government coffers.[103] The education of these children is exponentially more expensive than their hearing peers.[104] It is certainly true that even with an effective implant these children will still require special education services under the Individuals with Disabilities Education Act, but the cost will likely be significantly lower than without the surgery.[105] The cost of the surgery itself, if a government subsidy is required, is a one time payout coupled with the needed follow up care. Such cost, while significant, is dwarfed by the costs associated with educating a profoundly deaf child in residential deaf schools as advocated by the Deaf Culture movement.[106]

The harm of this parental choice is inflicted on society throughout the life of the affected child.[107] It is more likely that this individual will be a recipient of welfare benefits.[108] Statistically that makes it more likely that if the individual has children, they will too receive significant state assistance as well.[109] It is essential that we embrace technological and medical advances to have as many capable and qualified members of the workforce as possible.[110] These practical economic arguments are deeply rooted in

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[103] *See* Tucker, *supra* note 19, at 33-34 (detailing cost of special schools for deaf children compared to schools for hearing children).

[104] *See id.*

[105] *See* U.S. Food and Drug Administration, *Cochlear Implants*, http://www.fda.gov/cdrh/cochlear/riskbenefit.html (last visited Nov. 10, 2009) (explaining cochlear implants are not a cure and recipients are still hearing impaired); *see also* Tucker *supra* note 19, at 34. The Individuals with Disabilities Education Act specifically defines hearing impaired and deaf children as disabled under the Act. 20 U.S.C. § 1401(3)(A)(i) (2008).

[106] *See* Tucker, *supra* note 19, at 34.

[107] *See id.*

[108] *Cf.* Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 551 (2004) (stating individuals receiving SSDI and SSI benefits in the early 1990s increased, while employment among the disabled population decreased with the passage of the Americans with Disabilities Act).

[109] *Cf.* Joel F. Handler, *Ending Welfare As We Know It-Wrong for Welfare, Wrong for Poverty*, 2 GEO. J. ON POVERTY LAW AND POLICY 3, 4 (1994). Handler explains American society has long provided easy access to welfare for those who were viewed as having an excuse to not participate in the labor force. *Id.* *See also* Coverage and Payment for Cochlear Implants, *Why does Health Insurance Pay for Cochlear Implants?*, http://www.cochlear.org/sys-tmpl/door/ (last visited Nov. 10, 2009); Dallas Otolaryngology Associates Cochlear Implant Program, *Facts and Myths Regarding Deafness*, http://cochlearimplants.dallasoto.com/facts/deaf_facts.html (last visited Nov. 10, 2009).

[110] Neil Irwin & Annys Shin, *Economy Sinks Under Weight of Inventory; Data Not as Bleak as Expected*

the legal principles that strongly discourage economic waste.[111] Such societal interests may not be reason enough to force parents to provide cochlear implant surgery for their children, however, they certainly add validity and expediency to creation of a statutory remedy for these children whose parents deprive them of the right to hear.

Conclusion

The American philosopher John Rawls challenged society to design a theory of justice from behind a veil of ignorance without knowledge of our own lot in life.[112] If a child were born blind and a surgery existed that would restore a functionally significant portion of that child's sight, and if that surgery needed to be performed in the early years of life to maximize the chances for success, would society stand idly by as thousands of parents deprived their children of access to such a surgery? If a child were born without legs, would it be acceptable in our society for parents to deny their children prosthesis? If the answer is no then we must ask how it is permissible to allow a situation to persist whereby deaf children are, essentially, forced into poverty and isolation.[113] If the answer is yes, we must ask how such choices are morally or legally defensible particularly in light of both existing law and Rawlsian theory.[114] Providing these children with a right to speak up for themselves and demand acknowledgement will not allow them to be made whole, in whatever material way possible, but it will give parents who have this choice to make in the future a moment of pause, a moment to contemplate if their ideological beliefs are worth condemning their child to a life of deafness and if they still choose not to give their child the gift of hearing they do so knowing there may be tangible consequences for that choice later on.

Cochlear implants provide demonstrable benefits, on multiple levels, to those who receive them. This technology can restore functional hearing to those who have lost it later in life or, in the case of the pre-lingually deaf, cochlear implants can create functional hearing where none occurred previously. There is a substantially relevant segment of the deaf population that has ideological objections to this seemingly miraculous assistive technology. While the position of the Deaf culture movement may

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But Suggest Worst is Ahead, WASHINGTON POST, Jan. 31, 2009 at A1.

[111] *See generally* Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653 (2006) (explaining American jurisprudence strongly discourages economic waste in favor of promoting overall economic good).

[112] *See* Russell Korobkin, *Determining Health Care Rights From Behind a Veil of Ignorance*, 1998 U. ILL. L. REV. 801, 809-810 (1998). *See generally* Michael D. Weiss *A Jurisprudence of Blindness: Rawls, Justice, and Legal Theory*, 42 DRAKE L. REV. 565 (1993).

[113] *See supra* notes 11 and 102 and accompanying text.

[114] *See* Weiss, *supra* note 112.

be rooted in an entirely valid philosophical position, the imposition of such a belief on deaf children is much more problematic. Because of the nature of brain function and other medically relevant factors the earliest possible surgical intervention is critical to successful cochlear implant surgery. Deaf children whose parents deny them access to this surgery, a decision with life-long and irrevocable consequences, currently have no legal recourse.

When balancing the interests of parents, children and society it seems evident that, from both a legal and practical perspective, court mandated cochlear implant surgery is not a viable remedy. Crafting a statutory right to sue for the affected children preserves parental autonomy while also recognizing the legitimate interests of children and society. This solution protects both those children who do not object to their parent's choice as well as those that do by providing those children the right to seek damages from their parents. This also serves to protect society's interest in these children and to declare what the larger community believes is in the best interest of the affected children. It is time to recognize that while parents have a significant degree of leeway when choosing how to raise their children those choices have real consequences on their children, in this case a choice that cannot be undone. Society owes it then to these children to allow them the chance to speak for themselves once they reach adulthood and, if they choose to do so, to seek some measure of remedy for choices made by others in the child's infancy.