Note

Wrongful Life: Time for a "Day in Court"

I. INTRODUCTION

More than twenty-five years have elapsed since the first cause of action for a so-called "wrongful life" was brought in the Illinois case of *Zepeda v. Zepeda*.[1] While *Zepeda* dealt with a rather simple claim by an otherwise healthy infant against his biological father for having "caused" the infant to suffer his "wrongful life" as an "adulterine bastard,"[2] the wrongful life claim was soon introduced into far more complex and tragic contexts.

By far the most common of these has been in the area of genetic counseling for would-be parents and parents-to-be. The frequently touted marvels of modern technology have certainly increased the potential for informed decisionmaking by prospective parents with regard to possible congenital and genetic defects in their offspring. As one presidential commission has noted:

> The rapid advances now occurring in genetic screening techniques and the increased resources devoted to genetic counseling give Americans new opportunities to understand their biological heritage and to make their health care and reproductive plans accordingly. . . .
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> . . . The demand for such counseling has grown dramatically in the past decades and promises to become increasingly important as new screening tests are developed.[3]

With the new technology and its ability to provide some measure of assurance to prospective parents come the responsibility and duty of professionals to employ that technology correctly. When the duty to inform parents of potential genetic or congenital hazards faced by their offspring is breached, the result can be the birth of an impaired infant—one who might otherwise have been spared his suffering. This then is the assertion common to all wrongful life claims—that another's negligence has resulted in the birth of a child so impaired that it would have been better for that child never to have been born.[4]

While the wrongful life cause of action has turned up in a variety of factual situations, it has met with virtually no success on either the judicial[5] or the

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1. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

2. For those not familiar with the term, "[a]n adulterine bastard, as contrasted to an ordinary bastard, is a child born to parents one or both of whom is married to another person not a biologicial parent of the child. An ordinary bastard is simply an illegitimate child born to two unmarried parents." H. BUTZEL, GENETICS IN THE COURTS 1 (1987).

3. PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, SCREENING AND COUNSELING FOR GENETIC CONDITIONS 1, 4 (1983).

4. Some commentators have tried to avoid the starkness of this assertion by framing the claim for wrongful life in other terms, such as a failure to provide the impaired child's parents with information necessary to give "informed consent" to the continuation of the pregnancy.

5. The following jurisdictions have rejected a common law cause of action for wrongful life: Alabama, Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); Arizona, Walker v. Mart, No. CV-89-0065-CQ (Ariz. Apr. 12, 1990) (1909 WL 250); Colorado, Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988); Delaware, Garrison v.

legislative[6] level, especially when compared to the closely related claim of "wrongful birth," which emerged at about the same time.[7] At present, a cause of action for wrongful life has been clearly recognized in only three states.[8]

This Note will examine the wrongful life tort and its reception by the courts over the past twenty-five years. Section II begins by looking at the tort itself: the common core assertion and traditional negligence elements, as well as various fact patterns. Section III follows with a brief historical look at the tort, beginning with its origins in bastardy cases and proceeding through its limited acceptance in *Curlender v. Bio-Science Laboratories*[9] and related cases.

The rationales used by the courts in refusing to recognize the wrongful life cause of action will be examined in Section IV. The earliest rationales used by the courts are presented first: unascertainability of damages; conflicts over the abortion issue; and concerns about "opening the floodgates" of the court system

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Medical Center of Del. Inc., No. 193, 1988 (Sup. Ct. Del. Dec. 12, 1989) (1989 WL 160433); Florida, Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981); Idaho, Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984); Illinois, Siemieniec v. Lutheran Gen. Hosp., 117 Ill. 2d 230, 512 N.E.2d 691 (1987); Kansas, Bruggeman v. Schimke, 239 Kan. 245, 718 P.2d 635 (1986); Kentucky, Schork v. Huber, 648 S.W.2d 861 (Ky. 1983) (dictum); Massachusetts, Viccaro v. Milunsky, 406 Mass. 777, 551 N.E.2d 8 (Mar. 1, 1990) (1990 WL 18199); Michigan, Proffitt v. Bartolo, 162 Mich. App. 35, 412 N.W.2d 232 (1987); Missouri, Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988); New Hampshire, Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (1986); New York, Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); North Carolina, Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986); Pennsylvania, Ellis v. Sherman, 512 Pa. 14, 515 A.2d 1327 (1986); South Carolina, Phillips v. United States, 508 F. Supp. 537 (D.S.C. 1980) (construing South Carolina law); Texas, Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); West Virginia, James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985); Wisconsin, Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

6. The following jurisdictions have enacted statutes prohibiting a cause of action for wrongful life: Indiana, IND. CODE ANN. § 34-1-1-11 (Burns Supp. 1989); Maine, ME. REV. STAT. ANN. tit. 24, § 2931 (Supp. 1989); Minnesota, MINN. STAT. ANN. § 145.424 (West 1990); Missouri, MO. ANN. STAT. § 188.130-1 (Vernon Supp. 1990); North Dakota, N.D. CENT. CODE § 32-03-43 (Supp. 1989); South Dakota, S.D. CODIFIED LAWS § 21-55-1 (1987); Utah, UTAH CODE ANN. § 78-11-24 (1987, Supp. 1989).

7. For the distinction between wrongful life torts and wrongful birth torts, see *infra* note 16 and accompanying text.

8. The following states have recognized the wrongful life cause of action: California, Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); New Jersey, Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Washington, Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983). The status of wrongful life claims is unclear in two other states at this time. In dicta, the Supreme Court of Louisiana has determined that a physician has a duty to an unconceived child to warn the prospective parents and help them avoid conception when that physician knows or should know of the existence of an unreasonable risk that the child would be born with a birth defect. Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1157 (La. 1988).

In addition, an Indiana appellate court has recently recognized a wrongful life cause of action when the allegedly negligent acts of the defendant occurred prior to the plaintiff child's conception. *See* Cowe v. Forum Group, Inc., 541 N.E.2d 962 (Ind. App. 1989). In *Cowe*, the court noted that the language of a state statute prohibited a wrongful life cause of action only if based on the assertion that but for another party's negligence the plaintiff would have been aborted. *Id.* (citing IND. CODE ANN. § 34-1-1-11 (Burns Supp. 1989)). Such a statute was held not to apply to the case at hand, because the plaintiff was claiming *not* that he should have been aborted, but rather that he should never have been conceived. *Id.* at 965.

A similar problem could arise in most of the other states that have enacted "no wrongful life" statutes, because they too speak only in terms of the abortion issue. *See, e.g.*, ME. REV. STAT. ANN. tit. 24, § 2931 (Supp. 1989); MINN. STAT. ANN. § 145.424 (West 1990); N.D. CENT. CODE § 32-03-43 (Supp. 1989); UTAH CODE ANN. § 78-11-24 (1987, Supp. 1989). The South Dakota statute precludes a wrongful life cause of action for preconception acts as well as for those that prevented the infant's parents from obtaining an abortion. S.D. CODIFIED LAWS § 21-55-1 (1987). Although the Missouri statute speaks only to the abortion issue, a wrongful life cause of action had already been rejected by the state's common law. Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988).

9. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

to voluminous litigation. These rationales have generally been rejected by later courts, either because the law and policies supporting them have changed (as with the abortion issue), or because the rationales were merely indirect means of addressing what has since emerged as the courts' central and overriding concern: the sanctity of human life and its protection.

This "sanctity of life" rationale is then examined. It exists at two levels: the surface level, where the preference of courts for continued existence regardless of defects reflects a basic belief that nonexistence is never a valid alternative to an impaired existence; and a deeper level, where this deep-seated personal preference takes the form of a "logico-legal difficulty"[10] with comparing impaired existence to nonexistence.[11] Finally, Section V will consider a means of analyzing the difficult and emotional issues involved in wrongful life disputes, one that will lead to logically consistent, even though at times emotionally unsatisfying, results.

II. ANATOMY OF THE TORT

Although all wrongful life claims share a common core assertion, they defy easy characterization because of the many situations in which they arise and because of the varying circumstances of wrongful life plaintiffs. Despite this variety, it is easy to describe the structure of the tort in terms of its basic tort elements. Most of these elements—duty, breach, and causation—vary comparatively little from case to case. The final element, injury (with its resulting damages), is often the crucial one in courts' analyses, leading to great confusion and a seeming inequity of results. It is on this element of proof that most wrongful life claims fail.

A. *General Definition*

While the wrongful life tort is often viewed as controversial and innovative, it actually follows a very traditional negligence pattern, asserting the elements of duty, breach, causation, and injury.[12] In general, the wrongful life claim is made by or on behalf of an "impaired" child who asserts that he would have been spared his impaired existence, either through his parents' decision not to conceive or through a timely abortion, were it not for the negligent[13] acts or omissions of the defendant.[14] The infant plaintiff thus claims "not that he should have been born without defects but that he should not have been born at

10. Williams v. State, 18 N.Y.2d 481, 484, 223 N.E.2d 343, 345, 276 N.Y.S.2d 885, 888 (1966) (citing Tedeschi, *On Tort Liability for "Wrongful Life"*, 1 ISRAEL L. REV. 513 (1966)).

11. Ironically, even the few courts that have recognized a valid cause of action for wrongful life have failed to leap this hurdle. *See, e.g.*, Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983); Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); *see also* notes 148-70 and accompanying text.

12. Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 FAM. L.Q. 15, 21 (1980-81).

13. *But see* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964) (fraud, rather than negligence, as the basis for a wrongful life claim; *see infra* notes 67-69 and accompanying text).

14. Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967).

all" and that "but for the negligence of defendants, he would not have been born to suffer."[15]

B. *The Parties*

It is important to note that wrongful life suits are brought by or on behalf of the impaired infant himself. This distinguishes claims for wrongful life from those for "wrongful birth," which are brought instead by the parents of the impaired child for the emotional and financial damages that they have suffered as a result of the birth.[16] The two suits are usually brought together, although factors such as the parents' failure to meet the statute of limitations in filing their suit may result in one suit being brought without the other.[17]

Defendants in wrongful life suits are usually medical professionals or organizations to which the infant plaintiff's parents turned for guidance or other services in connection with the pregnancy.[18]

C. *Elements of Negligence*

1. *Duty and Breach*

A wrongful life claim requires a relationship between the defendant and the infant plaintiff's family that has created some duty on the part of the defendant toward the plaintiff and his parents. The exact relationship between the parties can vary, however. Many cases involve a physician who has provided negligent services to the impaired child's parents, either before or after conception of the child.[19] This negligence could involve such errors as "failing to take a genetic history of a couple or incorrectly informing a couple of their chances for giving birth to a defective child . . . or fail[ing] to inform them of possible tests that can be used to determine whether their child will be born with defects."[20] In other cases, the physician or other medical specialist has misdiagnosed a genetic condition in older siblings of the impaired child, thus preventing the parents from recognizing the possibility of the same condition occurring in the impaired child.[21] Often the defendant is a laboratory providing genetic

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15. *Id.*

16. Several courts have recognized a claim for "wrongful birth" brought by the parents of an impaired child, despite their rejection of the impaired child's own claim for wrongful life. *See, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979). In addition, courts have recognized claims for "wrongful conception" or "wrongful pregnancy" by parents of a healthy, but unplanned or unwanted, infant. These claims ask for damages in the amount of either the costs of the pregnancy alone, or the costs of raising the child to majority. For more on the wrongful birth and wrongful conception torts, see Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time For a New Framework*, 22 J. FAM. L. 677, 690-700 (1983-84).

17. *See, e.g.*, Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984).

18. For some exceptions to this, see Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964) (suit against the biological father); Cowe v. Forum Group, Inc., 541 N.E.2d 962 (Ind. App. 1989) (suit against the owner of a private nursing home); Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) (suit against the State through its mental hospital).

19. *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

20. Trotzig, *supra* note 12, at 22.

21. *See, e.g.*, Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

screening or genetic counseling services to the parents, either before or after conception has taken place.[22] Finally, the defendant may be a physician who has performed either an unsuccessful sterilization procedure or an unsuccessful abortion for the parents.[23]

With few exceptions,[24] modern courts have had little trouble accepting the elements of duty and breach in wrongful life suits. This would not always have been true, however. As one commentator has noted, "Courts traditionally have been reluctant to find that a duty can be owed to someone who has not been born or conceived at the time of the defendant's allegedly negligent act."[25] It was only in the case of *Bonbrest v. Kotz*,[26] decided in 1946, that the long-held common law view that "children were unable to recover for prenatal injuries because a duty could not be owed to someone as yet unborn"[27] was overturned. For the first time an unborn child, as long as it was viable at the time of injury and was subsequently born alive, could maintain a valid cause of action for prenatal injuries.[28]

This view has since expanded in most jurisdictions to include not only injuries sustained after the fetus has become viable, but also those injuries received after conception but before viability.[29] Many courts have gone even further and "permit[ted] an infant, born alive, to bring an action for injuries arising out of preconception negligent conduct"[30] by stressing the foreseeability of the harm to the fetus.[31] Thus, legal duties to an infant have been found to exist before birth, before viability, and even before conception.[32]

The "informed consent" doctrine often provides the basis for a claim of duty in wrongful life suits.[33] If a defendant "knows or should know of facts that indicate an increased likelihood of a deformity in a child, he ought to disclose that information to the parents to permit them to choose intelligently whether to conceive a child or, if one is conceived, whether to terminate the pregnancy."[34] This duty can then be extended to the child in one of two ways, either by recognizing a separate duty to the child that is similar to the one owed to the parents,[35] or by identifying the child as a foreseeable third-party victim of the breached duty owed to the parents (*i.e.*, a "derivative" duty).[36] Whether by

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22. *See, e.g.*, Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

23. *See, e.g.*, Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151 (La. 1988).

24. *See, e.g.*, Albala v. City of New York, 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981).

25. Note, Park v. Chessin: *The Continuing Judicial Development of the Theory of "Wrongful Life"*, 4 AM. J. L. & MED. 211, 219 (1978-79).

26. 65 F. Supp. 138 (D.D.C. 1946).

27. Note, *supra* note 25, at 219.

28. Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713, 731 (1981-82).

29. *Id.* at 731.

30. *Id.* at 732 (quoting Bergstresser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978)).

31. *Id.*

32. *Id.*

33. Comment, *"Wrongful Life": The Right Not to be Born*, 54 TUL. L. REV. 480, 488 (1979-80).

34. *Id.* at 488-89.

35. *See, e.g.*, Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1157-58 (La. 1988). For the problems associated with this view and a satisfactory rebuttal, see Comment, *supra* note 33, at 489-90.

36. Comment, *supra* note 33, at 490.

direct or derivative approaches, however, courts have been willing to recognize a duty to the unborn (and often even unconceived) child.

2. *Causation*

The element of causation has not presented a problem in wrongful life suits except where courts, and even plaintiffs,[37] have misunderstood what the claim actually asserts.[38] For example, the majority in *Ellis v. Sherman*[39] felt that "[t]he condition about which the plaintiff complains, a diseased life, was inflicted upon the plaintiff not by any person, but by the plaintiff's genetic constitution."[40] The court then concluded that there could be no legal injury to the infant because "*the condition was caused not by another*, but by natural processes."[41]

As the *Ellis* dissent pointed out, however, "[t]he child in this case . . . is not claiming that the doctors 'caused his disease'."[42] Rather, the child was claiming that the defendant's "negligence—his failure to adequately inform the parents of the risk—has caused the *birth* of the deformed child. The child argues that *but for* the inadequate advice, it would not have been born to experience the pain and suffering attributable to the deformity."[43]

Thus, whether or not a court has found causation between the defendant's negligence and the child's "condition" has depended to a large degree on what the court considered the condition to be. As one commentator has noted:

> If one accepts the idea that the damage the child is suing for is not its deformity, but rather its birth, then proximate cause presents little obstacle to the child's recovery. . . . To complete the chain of causation, the child would then have to show that had his parents been so informed, they would have prevented his birth.[44]

3. *Injury*

Injury has undoubtedly been the most troublesome element of a wrongful life suit for the courts.[45] All wrongful life claims assert an impaired life as the injury; thus, the child asserts that the "net burden" of his life—the burdens of his impairment mitigated by the benefits he has enjoyed as a result of his existence—is an injury caused by the defendant's negligence.[46] However, the degree of actual impairment has varied greatly from case to case. Some cases have involved otherwise healthy infants whose only impairment has been being born

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37. *See, e.g.*, Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

38. *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

39. 512 Pa. 14, 515 A.2d 1327 (1986).

40. *Id.* at 19, 515 A.2d at 1329.

41. *Id.*

42. *Id.* at 22, 515 A.2d at 1330 (Larsen, J., dissenting).

43. Comment, *supra* note 33, at 485.

44. *Id.* at 491. For a discussion of the standard to be used in determining whether the parents would have chosen to prevent the birth, see *id.* at 491-92.

45. *Id.* at 492.

46. *See* Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis]*, 55 MINN L. REV. 58, 64-67 (1970-71).

in a state of illegitimacy.[47] Others have involved children born with such defects as blindness,[48] deafness,[49] or Down's Syndrome,[50] who can expect a relatively normal and functional life span. Finally, there are cases of children with severely debilitating conditions such as Tay-Sachs disease,[51] polycystic kidney disease,[52] or cystic fibrosis,[53] who can expect at best a greatly shortened life span filled with often intense pain and suffering.

Courts have had great difficulty in viewing any of these impaired lives as an "injury" to a child.[54] In the courts' approach, "life—whether experienced with or without a major physical handicap—is more precious than non-life,"[55] and thus a child can *never* be injured, as a matter of law, by being born.[56] The courts therefore set up a nonrebuttable presumption in favor of life, with no opportunity for the trier of fact to judge each situation for itself and to make appropriate decisions. This is all done under the guise of logical and legal principles. What is most important to recognize in this context, however, is that "[i]n ruling in this fashion, courts are not announcing purely rational conclusions derived from legal principles but are instead proclaiming their *personal* views on certain value-laden 'facts'."[57]

4. *Damages*

The traditional goal of the law in awarding damages in a negligence action is to compensate the plaintiff for his injury.[58] While most injuries suffered in wrongful life cases are nonpecuniary in nature, the compensatory goal can still exist: "[t]he real purpose in such cases is to establish and vindicate a right that is deemed important, even though not pecuniary in its immediate consequence."[59]

Damages are normally measured by "comparing the condition plaintiff would have been in, had the defendant[] not been negligent, with plaintiff's impaired condition as a result of the negligence."[60] In wrongful life claims, then, the child usually asserts as "general" damages the pain and suffering he will endure during his lifetime as a result of the defect, but presumably less the

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47. *See, e.g.*, Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

48. *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

49. *See, e.g.*, Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

50. *See, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979).

51. *See, e.g.*, Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

52. *See, e.g.*, Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

53. *See, e.g.*, Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981).

54. *See infra* notes 151-73 and accompanying text.

55. Berman v. Allan, 80 N.J. 421, 429, 404 A.2d 8, 12 (1979).

56. *See id.* at 429, 404 A.2d at 12.

57. Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 650 (1979) (emphasis added). For a discussion of this view, see *infra* notes 174-86 and accompanying text.

58. D. DOBBS, REMEDIES § 3.1, at 135 (1973).

59. *Id.* at 136. However, punitive damages have also been claimed. *See, e.g.*, Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

60. Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967).

benefits he will derive from his existence, if any.[61] This "net burden" is then measured not against the value of a "normal" life, but against the nullity of nonexistence.[62]

Plaintiffs in wrongful life suits also frequently request "special" damages to cover the costs of medical care, special educational or training needs, and specialized equipment.[63] These special damages may be sought either as to expenses that will arise after the child has reached majority or as to all expenses incurred, during both minority and majority. The choice depends largely on whether the costs incurred during the child's minority are already being sought by the child's parents in a separate suit.[64]

III. A Brief Historical Background

The twenty-five year history of the wrongful life tort has largely been one of rejection, with occasional periods of limited acceptance. This Section will look at the major turning points in the development of the tort, as well as at the major cases that have helped influence the way in which courts view wrongful life claims today.

A. *The Earliest Cases*

The first two cases that contained a claim for wrongful life were similar in that the "impairment" allegedly suffered by the plaintiff infants was not a physical disease or handicap, but the social stigma of illegitimacy. While some commentators have insisted that these cases do not really involve "wrongful life" claims,[65] they have been included here because of the impact they had on what is usually considered to be the first "true" wrongful life case, *Gleitman v. Cosgrove*.[66]

The infant plaintiff in *Zepeda v. Zepeda*[67] brought suit through his mother against his biological father, who had allegedly "induced the plaintiff's mother to have sexual relations by promising to marry her; this promise was not kept and could not be kept because, unbeknown to the mother, the defendant was already married."[68] Thus, the basis of the claim was not negligence, but fraud. The infant sought general damages to compensate "for the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his father, to inherit from his paternal ancestors and for being stigmatized as a bastard."[69]

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61. For a brief discussion of the benefit rule, see *infra* note 197 and accompanying text.

62. *See* Note, *supra* note 25, at 226.

63. 7 Shepard's Causes Of Action 628 (1988).

64. Generally, parents have brought their own wrongful birth actions to recover expenses of the child during minority, unless they have been precluded by the statute of limitations.

65. *See, e.g.*, Trotzig, *supra* note 12.

66. 49 N.J. 22, 227 A.2d 689 (1967).

67. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

68. *Id.* at 245, 190 N.E.2d at 851.

69. *Id.* at 246, 190 N.E.2d at 851.

The infant was mistaken, however, in asserting that he had been deprived by his father's fraudulent act of having a normal—and "legitimate"—life. The father's inducement of sexual relations did not take away the status of normalcy and legitimacy from a plaintiff who already possessed them; rather, these were conditions which, because of the father's already-married status, could not possibly have come about for this particular infant.[70] The proper measure of damages would thus have been, according to the wrongful life claim asserted by plaintiff, *not* the difference between a normal, legitimate life and the life he led as an illegitimate child, *but rather* the difference between total nonexistence and his life as an illegitimate child.

The court acknowledged that the defendant father had committed a tortious act,[71] and that the infant plaintiff had undoubtedly suffered an injury by being born illegitimate.[72] Nevertheless, the court upheld a lower court's dismissal of the suit for a failure to state a cause of action. The court based its decision squarely on policy grounds. It feared that recognition of the new tort would lead not only to similar suits filed by the hundreds of thousands of illegitimately born children in the state, but could extend as well to suits by other "impaired status" groups who might claim to have suffered "injuries" by their birth into racial minority, socio-economically deprived, or even too-large families. Noting that "[t]he legal implications of such a tort are vast, [and that] the social impact could be staggering,"[73] the court left it to the legislature to handle the problem.[74]

The *Zepeda* decision was followed three years later by *Williams v. State*,[75] another suit involving illegitimacy. The infant plaintiff's mother had been a patient in a mental institution run by the state of New York. Because of the institution's alleged negligence in protecting the safety of the mother, a sexual assault had occurred that resulted in the conception and subsequent birth of the plaintiff. Because of her birth to an unmarried and "mentally deficient" mother, the plaintiff claimed damage in being "deprived of property rights; deprived of a normal childhood and home life; deprived of proper parental care, support, and rearing; [and] caused to bear the stigma of illegitimacy."[76]

Once again, however, a plaintiff had mistaken the nature of the injury actually suffered. As pointed out by Judge Keating in a concurring opinion, the plaintiff's comparison of her current position and a "normal and legitimate" life was unwarranted, because "had the State acted responsibly, she would not have been born legitimately—she would not have been born at all."[77]

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70. In analyzing these actions, it is necessary to avoid conceptualizing the plaintiff before birth as a disembodied "baby spirit" waiting in limbo for the next available chance to be born. Each conception results in the creation of a new person—if an unborn plaintiff is terminated due to impairment, etc., he will not get another chance at a "normal" or healthy body.

71. *Zepeda*, 41 Ill. App. 2d at 259, 190 N.E.2d at 858.

72. *Id.* at 258, 190 N.E.2d at 857.

73. *Id.* at 259, 190 N.E.2d at 858.

74. *Id.* at 262-63, 190 N.E.2d at 859.

75. 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

76. *Id.* at 482, 223 N.E.2d at 343, 276 N.Y.S.2d at 886.

77. *Id.* at 485, 223 N.E.2d at 345, 276 N.Y.S.2d at 888 (Keating, J., concurring).

The court dismissed the suit for failure to state a claim, citing first its reluctance to "invent a brand new ground for suit."[78] Moreover, the court refused to recognize illegitimacy alone as an injury giving rights to damages. As the court stated, "[b]eing born under one set of circumstances rather than another . . . is not a suable wrong that is cognizable in court."[79] While the court seemed to have considered only the "injury" of illegitimacy and not that of debilitating physical impairment in rendering its decision, the "noncognizability" language was echoed by later courts when dealing with the latter, more difficult, cases.

B. *The First "True" Wrongful Life Case*

The seminal case in the development of the wrongful life tort was *Gleitman v. Cosgrove*,[80] decided in 1967. The case consisted of parallel claims for wrongful life by an impaired infant and for wrongful birth by his parents. The defendants were the physicians who had treated the infant's mother during her pregnancy. According to the plaintiffs, the mother had informed the defendants at the time that she learned she was pregnant of a recent illness diagnosed as German measles.[81] The defendants had allegedly told her that this would present no problems, and failed to warn her of the possibility of resultant defects. After several episodes of similar inquiry and reassurance throughout the term of the pregnancy, Mrs. Gleitman gave birth to plaintiff Jeffrey, who suffered from substantial defects in sight, hearing, and speech as a result of his exposure as a fetus to his mother's German measles.[82]

Unlike his predecessors in *Zepeda* and *Williams*, the infant plaintiff in *Gleitman* did not allege that the defendants' negligence had prevented him from enjoying a normal existence. He expressly stated that the best position he could have achieved was nonexistence, and asked for damages measuring only the difference between nonexistence and the severely impaired condition in which he lived. The trial court dismissed the claim for failure to show proximate cause,[83] not seeing the real issue even though the plaintiff had stated it correctly. The plaintiff did not claim that the defendants had caused his physical impairments directly; rather, their negligent failure to provide the plaintiff's mother with the information necessary for her decision to terminate the pregnancy had proximately caused the plaintiff's birth and existence, with its resulting suffering.

The Supreme Court of New Jersey in a five-two split decision affirmed the trial court's dismissal, but for reasons different from those stated by the trial court. First, it found the measurement of the difference between a life impaired by defects against "the utter void of nonexistence" to be too difficult.[84] In addition, the court saw a logical impossibility in the plaintiff's ability to prove dam-

78. *Id.* at 483, 223 N.E.2d at 344, 276 N.Y.S.2d at 887.
79. *Id.* at 484, 223 N.E.2d at 344, 276 N.Y.S.2d at 887.
80. 49 N.J. 22, 227 A.2d 689 (1967).
81. *Id.* at 24, 227 A.2d at 690.
82. *Id.* at 25, 227 A.2d at 690.
83. *Id.* at 26, 227 A.2d at 691.
84. *Id.* at 28, 227 A.2d at 692.

ages due to the birth because "no comparison is possible since were it not for the act of birth the infant would not exist. By his cause of action, the plaintiff cuts from under himself the ground upon which he needs to rely in order to prove his damage."[85] The court also cited approvingly the two earlier wrongful life cases and the policy reasons for their denials of recovery.[86]

Two other important rationales for the court's ruling against the plaintiff can be found in other parts of the opinion. In denying the parents' claim for wrongful birth, the court demonstrated an overwhelming preference for life over nonexistence, no matter what the conditions of that life. The availability of a legal abortion for the parents was hotly debated by the court, at least in the nonmajority opinions.[87] However, the court was decidedly against the desirability of allowing even a legal abortion under such circumstances, expressing a fear of eugenics considerations overriding the "sanctity of the single human life."[88]

The court also stated its preference for life in general terms, admonishing the parents that "[a] child need not be perfect to have a worthwhile life,"[89] and that "[e]xamples of famous persons who have had great achievement despite physical defects come readily to mind."[90] The court concluded that part of being human is the pursuit of life under any terms possible and the refusal to let it slip away.[91]

C. *Post*-Roe v. Wade *Developments*

Twelve years later, the Supreme Court of New Jersey again faced a wrongful life complaint in the case of *Berman v. Allan*.[92] The questions concerning the legality of abortion in wrongful life contexts had been settled six years earlier in 1973 with the decision of *Roe v. Wade*.[93] While abandoning the abortion issue and other rationales of the *Gleitman* court, the *Berman* court came up with its own reasons to deny recovery.

The infant plaintiff in *Berman* had been conceived when her mother was thirty-eight years old, an advanced age that was a significant risk factor for the development of Down's Syndrome in the infant.[94] The defendant doctor had allegedly failed to warn the plaintiff's mother of this risk and had neglected to inform her of a procedure called amniocentesis, which would have shown the presence of the abnormality in the unborn child.[95] As a result, the plaintiff's mother carried her to term and the plaintiff was born with the impairment.

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85. *Id.* at 29, 227 A.2d at 692 (quoting Tedeschi, *On Tort Liability for "Wrongful Life"*, 1 ISRAEL L. REV. 513, 529 (1966)).

86. *Gleitman*, 49 N.J. at 29, 227 A.2d at 692.

87. *See, e.g., id.* at 32-49, 227 A.2d at 694-703 (Francis, J., concurring); *id.* at 49-55, 227 A.2d at 704-06 (Jacobs, J., dissenting); *id.* at 55-63, 227 A.2d at 707-11 (Weintraub, C.J., dissenting in part).

88. *Id.* at 30, 227 A.2d at 693.

89. *Id.*

90. *Id.*

91. *Id.* at 31, 227 A.2d at 693. For more on the impact of the abortion controversy on the wrongful life claim, see *infra* notes 134-50 and accompanying text.

92. 80 N.J. 421, 404 A.2d 8 (1979).

93. 410 U.S. 113 (1973).

94. *Berman*, 80 N.J. at 425, 404 A.2d at 10.

95. *Id.*

As in *Gleitman*, a majority of the court dismissed the plaintiff's claim for failure to state a valid cause of action. However, the reasoning behind the *Berman* decision was different. First, the court expressly rejected two of the bases for the *Gleitman* decision: difficulty in ascertaining damages and the question of whether a legal abortion was attainable. As to the first basis, the court expressed extreme reluctance to "deny the validity of [the infant] Sharon's complaint solely because damages are difficult to ascertain."[96] Rather, it stated that, in the absence of other problems with the claim, it would be willing to fashion at least a partial remedy.[97]

The court also rejected the policy concerns of the *Gleitman* court over the legal procurement of an abortion, noting in fact that public policy now favored the wrongful life tort because parents had a right to choose for themselves and their baby whether or not to abort an impaired fetus.[98] Instead, the court focused on what had provided the basic foundation for the abortion argument: a "sanctity of life" rationale. After supplying references to various indirect "manifestations" of the importance of life in American society,[99] the court proclaimed that life was always preferable to nonlife, and so the plaintiff, as a matter of law, could not have suffered any harm or injury by being brought to life, even in an impaired state. This rationale, in one form or another, was to remain as one of the prevalent arguments used by later courts to reject wrongful life claims.

D. Curlender v. Bio-Science Laboratories *and its Progeny*

Curlender v. Bio-Science Laboratories,[100] decided in California in 1980, was the first intermediate-level court decision recognizing a wrongful life cause of action not to be reversed by the state supreme court.[101] In *Curlender*, the infant plaintiff's parents had gone to the defendant laboratories for testing to determine if they were carriers of Tay-Sachs disease, a hereditary affliction affecting mostly persons of Ashkenazi Jewish descent and "characterized by partial or complete loss of vision, mental underdevelopment, softness of the muscles, [and] convulsions, etc."[102] As a result of the alleged negligence of the laboratories, the plaintiff's parents were told that they were not carriers of the disease, which led to their decision to carry the plaintiff to term. The plaintiff was born afflicted with Tay-Sachs disease, however, and had an estimated life expectancy of only four years.[103]

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96. *Id.* at 428, 404 A.2d at 12.

97. *Id.*

98. *Id.* at 431-32, 404 A.2d at 14.

99. *See infra* notes 180-84 and accompanying text.

100. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

101. However, the types of damages available to a wrongful life plaintiff were considerably limited by a subsequent case. Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982). For an example of a state supreme court decision completely reversing a lower court's recognition of a wrongful life claim, see Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985).

102. *Curlender*, 106 Cal. App. 3d at 815-16, 165 Cal. Rptr. at 480, n.4 (quoting J. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE (1980)).

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

The court looked first at the rationales used by other jurisdictions in dismissing wrongful life claims. Finding merit in the *Zepeda* court's approach to denying damages based on an injury of "illegitimate status," the court then carefully distinguished the present case, in which actual physical injury was involved.[104] The court then rejected *Gleitman*'s reliance on the "impossibility of measuring damages" rationale as a basis for denying relief and stated that public policy considerations, such as societal interests in deterring similar negligence and preventing or minimizing genetic and congenital defects, weighed heavily in favor of recognizing the tort.[105] Finally, the court announced that it was about to break with other jurisdictions and demonstrate "the understanding that the law reflects, perhaps later than sooner, basic changes in the way society views such matters."[106]

While recognizing the wrongful life claim as a traditional tort, the court also acknowledged that "[t]he extent of recovery . . . is subject to certain limitations due to the nature of the tort involved . . . [and thus] it is appropriate . . . to tailor the elements of recovery."[107] The court considered appropriate damages to be "pain and suffering to be endured during the limited life span available to such a child and any special pecuniary loss resulting from the impaired condition."[108] Thus, both general and special damages were to be allowed. However, the court went even further in stating that punitive damages could also be awarded if the plaintiff could prove malice, fraud, or oppression on the defendant's part.[109]

The *Curlender* decision was limited by the later case of *Turpin v. Sortini*,[110] but only as to the damages awardable; the wrongful life claim continued to be recognized. In *Turpin*, the negligent failure of a hearing specialist to properly diagnose an older sibling of the infant plaintiff as suffering from a genetic disorder that made the sibling "stone deaf" led to the decision of the infant's parents to conceive a second child, the plaintiff. The plaintiff was also born totally deaf as a result of the illness[111] and sought both general and special damages to compensate her for her injury.

The court followed the *Curlender* decision in refusing to dismiss the plaintiff's claim on the defendant's demurrer. However, it took a very different approach to considering the damages available to the plaintiff.[112] Rather than allow general, special, and even punitive damages, the court excluded recovery for everything but the special costs of medical care, education, and training that the plaintiff would incur during her lifetime.[113]

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104. *Id.* at 825, 165 Cal. Rptr. at 486.
105. *Id.* at 825-26, 165 Cal. Rptr. at 486-87.
106. *Id.* at 827, 165 Cal. Rptr. at 487.
107. *Id.* at 830, 165 Cal. Rptr. at 489.
108. *Id.* at 831, 165 Cal. Rptr. at 489.
109. *Id.* at 831-32, 165 Cal. Rptr. at 490.
110. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).
111. *Id.* at 223-24, 643 P.2d at 956, 182 Cal. Rptr. at 339.
112. *Id.* at 237, 643 P.2d at 965, 182 Cal. Rptr. at 348.
113. *Id.*

While the logic of this approach has been criticized by other courts,[114] it has been followed by the highest courts of two other jurisdictions. In *Harbeson v. Parke-Davis, Inc.*,[115] the Supreme Court of Washington followed the reasoning of *Curlender* and *Turpin* by holding as a matter of Washington law that "a child may maintain an action for wrongful life in order to recover the extraordinary expenses to be incurred during the child's lifetime, as a result of the child's congenital defect."[116] In reaching its decision, the court pointed out the anomoly of allowing the parents of a defective infant to recover damages for the extraordinary medical expenses incurred by the infant through a wrongful birth claim, but not allowing the infant to recover those same damages in its own right when the parents' claim had been precluded. As with *Turpin*, however, only a claim for special damages was allowed. In *Procanik v. Cillo*,[117] the state of New Jersey became the third jurisdiction to recognize the wrongful life cause of action, through the same supreme court that had earlier decided both *Gleitman* and *Berman*. *Procanik* concerned the claim of an impaired infant whose parents' parallel claim for wrongful birth had been barred by the statute of limitations, the exact situation that had concerned both the *Turpin* and *Harbeson* courts. Agreeing with the analysis in those two cases, the court in *Procanik* rejected the lower court's dismissal of the infant plaintiff's wrongful life claim, at least with respect to damages for any special expenses to be incurred. As noted by the court:

> Law is more than an exercise in logic, and logical analysis, although essential to a system of ordered justice, should not become a[n] instrument of injustice. . . . The right to recover the often crushing burden of extraordinary expenses visited by an act of medical malpractice should not depend on the "wholly fortuitous circumstances of whether the parents are available to sue."[118]

To date, these are the only jurisdictions in which the wrongful life tort has been recognized.[119] Perhaps the approach of these courts in denying general damages while allowing special damages can best be seen as one version of the "partial remedy" concession to equity foreseen by the *Berman* court.

IV. JUDICIAL REASONS FOR REJECTING THE WRONGFUL LIFE CAUSE OF ACTION

Courts have stated various reasons for rejecting wrongful life claims over the past twenty-five years. Some of these have survived practically unchanged throughout that period; others have been reshaped to fit changing circumstances, expressly rejected by later courts, or quietly abandoned when they lost their "bite." Notably, it has been the "sanctity of life" arguments, whether ex-

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114. *See, e.g.*, Siemieniec v. Lutheran Gen. Hosp., 117 Ill. 2d 230, 512 N.E.2d 691 (1987).

115. 98 Wash. 2d 460, 656 P.2d 483 (1983).

116. *Id.* at 479-80, 656 P.2d at 495.

117. 97 N.J. 339, 478 A.2d 755 (1984).

118. *Id.* at 351-52, 478 A.2d at 762 (quoting Turpin v. Sortini, 31 Cal. 3d 220, 238, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982)).

119. For developments in Louisiana and Indiana, where the status of the wrongful life cause of action is in some doubt, see *supra* note 5.

press or implicit, that have continued to trouble wrongful life plaintiffs in recent cases.

A. *Abandoned Arguments*

1. *"Opening the Floodgates"*

While the court in *Zepeda v. Zepeda*[120] recognized that a "tortious act" had been committed by the defendant,[121] it found overriding policy reasons to deny recovery to the infant plaintiff. One commentator has noted that "[t]he Illinois court was not merely worried that entertaining [the] suit would open the floodgates of litigation [to] the claims of the quarter million illegitimate children born each year in the United States."[122] While such a result would have been a disaster of epic proportions, the potential stakes were even higher. As the court itself stated:

> What does disturb us is the nature of the new action and the related suits which would be encouraged. Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation.[123]

The court's concern about stimulating wrongful life suits did not stop even with these groups, however. The court indulged in some creative extrapolation to consider the possibility of even more wrongful life suits, such as those that might be brought by the dissatisfied offspring of public sperm bank donees, victims of intentional genetic mutation, and newly invented (and presumably humanoid) life forms.[124]

The "floodgates" rationale does not usually appear in later wrongful life suits, which deal with genetic or congenital defects rather than with social or economic status, and for several reasons. First, "there is a world of difference between an unwanted healthy child who is illegitimate . . . and the severely deformed infant plaintiff."[125] Because these serious physical injuries are more easily distinguishable from the "injuries" of the litigious masses anticipated by the *Zepeda* court than was the illegitimacy suffered by the infant Zepeda, an award of damages to the former group would be easier to distinguish with a "bright line" test than would have an award in the *Zepeda* case.

More important, though, is the difference in the assertions being made in the two types of cases. Complaints of impairment based on race, social class, illegitimacy, or the like are premised on a "status which may or may not prove to be a hindrance to one so born, depending on a multitude of other facts."[126]

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120. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

121. *Id.* at 247, 190 N.E.2d at 852.

122. Capron, *Informed Decisionmaking In Genetic Counseling: A Dissent to the "Wrongful Life" Debate*, 48 IND. L.J. 581, 600 (1973).

123. *Zepeda*, 41 Ill. App. 2d at 260, 190 N.E.2d at 858.

124. *Id.* at 260-62, 190 N.E.2d at 858-59.

125. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 825, 165 Cal. Rptr. 477, 486 (1980).

126. *Id.*

Thus, the court in *Curlender v. Bio-Science Laboratories*[127] had no trouble in allowing an infant plaintiff with Tay-Sachs disease to recover damages, while agreeing with the *Zepeda* court's rejection of the illegitimacy complaint.[128] The *Curlender* court concluded that:

> [A] cause of action based upon impairment of status—illegitimacy contrasted with legitimacy—should not be recognizable at law *because* a necessary element for the establishment of any cause of action in tort is missing, *injury*, and damages consequential to that injury. A child born with severe impairment, however, presents an entirely different situation because the necessary element of *injury* is present.[129]

The courts have also been concerned that the probable targets of the hundreds of thousands of "impaired status" suits potentially flooding into the courts will be the parents of the plaintiffs. While the courts have stressed the strong policy reasons for preventing children born into "less than perfect" lives from suing their own parents because of it, at least one commentator believes that the concern is misplaced for several reasons:

> Even if we assume that there is no longer intrafamilial immunity in the jurisdiction, the simple fact remains that such suits are unlikely because the child's parents, as his guardians or "next friends," actually instigate suit on the child's behalf, and it is unlikely that they would, in effect, sue themselves. Yet even if the state routinely appointed special guardians for all defective children (or all children for that matter) with instructions to bring any necessary lawsuits, such suits would be of little practical value. Parents are already legally obliged to support their children . . . . Consequently, unlike a recovery against an outside party . . . a recovery against the parents would just shift family funds (less lawyers' fees and court costs) from one pocket to another.[130]

Finally, wrongful life claims against parents are fundamentally different from those against third parties because the former lack the negligence requirement of a breached legal duty.[131] As pointed out by one commentator:

> [P]arents, in choosing not to abort, have exercised their legal right to make this choice . . . . [A]bsent proof of intentional disregard of their child's interests or gross negligence in the exercise of their discretion, such an exercise of judgment would not subject the couple to liability . . . . [I]t is up to them to weigh the probabilities and risks and to decide . . . .[132]

At least one state has codified a special parental immunity from wrongful life claims, while allowing claims against third parties.[133]

2. *The Abortion Controversy*

The abortion controversy has always been closely associated with the wrongful life tort. If parents are prohibited by law from choosing to abort a defective fetus, there can be no legal duty on the defendant to respect a poten-

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127. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).
128. *Id.* at 825, 165 Cal. Rptr. at 486.
129. *Id.*
130. Capron, *supra* note 122, at 601-02.
131. *Id.* at 602.
132. *Id.*
133. CAL. CIV. CODE § 43.6(a) (Deering 1988).

tial abortion choice. Thus, the wrongful life tort depends upon the freedom of parents to choose termination of a pregnancy, at least when it is applied to postconception negligence.[134]

The first "true" wrongful life case, *Gleitman v. Cosgrove*,[135] was decided in 1967, while abortion rights were still a matter of state control.[136] While the majority in *Gleitman* "assumed" for its discussion that "somehow or somewhere Mrs. Gleitman could have obtained an abortion that would not have subjected participants to criminal sanctions,"[137] the matter was openly contested in the separate opinions.[138] Even the majority opinion referred to the abortion issue again when discussing the wrongful birth claim of the parents, but only to say that the rationale it had used to evaluate the claim resulted in no need to consider "whether the abortion which plaintiffs were denied the opportunity to obtain would have been illegal."[139] The majority's sentiments concerning the relative weights it put on the state's interest in preserving life and the parents' right to choose even legal abortions became clear, however, when it held that any damages resulting from a violation of the parents' right "would be precluded by the countervailing public policy supporting the preciousness of life."[140]

In 1973, the decision in *Roe v. Wade*[141] "placed abortions decisions during the first trimester of pregnancy within the constitutional right of privacy derived from the fifth and fourteenth amendments."[142] With the parental right to abortion and its corresponding imposition of a legal duty on third parties to respect that right now constitutionally entrenched, the courts retreated from anti-abortion arguments to the broader "sanctity of life" arguments that had been the primary concern all along.[143]

For instance, the Supreme Court of New Jersey in *Berman v. Allan*[144] acknowledged that its decision in *Gleitman* twelve years earlier had been based in part on the conclusions "that 'substantial [public] policy reasons' precluded the judicial allowance of tort damages 'for the denial of the opportunity to take an embryonic life.' "[145] The court then went on to reject outright the anti-abortion ground of *Gleitman*:

> In light of changes in the law which have occurred in the 12 years since *Gleitman* was decided, the second ground relied upon by the *Gleitman* majority can no longer stand in the way of judicial recognition of a cause of action founded upon wrongful birth. The Supreme Court's ruling in *Roe v. Wade* . . . clearly establishes that a woman possesses a constitutional right to decide whether her fetus should be aborted, at

134. Even if abortion becomes illegal, claims for wrongful life could still be recognized for negligent acts or omissions of the defendant that led to the wrongful conception of the child.

135. 49 N.J. 22, 227 A.2d 689 (1967).

136. Rogers, *supra* note 28, at 722-23.

137. *Gleitman*, 49 N.J. at 27, 227 A.2d at 691.

138. *See supra* note 87.

139. *Gleitman*, 49 N.J. at 31, 227 A.2d at 693.

140. *Id.* There is a natural dovetailing of the anti-abortion and "sanctity of life" arguments. For a discussion of the latter, see *infra* notes 174-86 and accompanying text.

141. 410 U.S. 113 (1973).

142. Rogers, *supra* note 28, at 723.

143. *See, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979).

144. 80 N.J. 421, 404 A.2d 8 (1979).

145. *Id.* at 431, 404 A.2d at 14.

least during the first trimester of pregnancy. Public policy now supports, rather than militates against, the proposition that she not be impermissibly denied a meaningful opportunity to make that decision.[146]

For the most part,[147] courts in more recent cases have also acknowledged that the anti-abortion argument is no longer valid against wrongful life plaintiffs.[148] While at least one court deemed the *Roe* decision "to be of considerable importance in defining the parameters of 'wrongful-life' litigation,"[149] acceptance of *Roe* by other courts has been tacit, as they invoke broader-based "sanctity of life" arguments for rejecting wrongful life claims.[150]

3. *Difficulties with Damages*

The courts have had significant problems when considering the issue of damages in wrongful life suits. These problems basically exist on two levels: first, the great difficulty courts face in ascertaining and measuring what damages are due the defective plaintiff; and second, the bigger question of whether any damages can logically and legally have been suffered at all by the plaintiff because of his birth—in other words, another manifestation of the "sanctity of life" argument.[151]

The first problem—ascertaining and measuring damages—was originally brought up in *Gleitman v. Cosgrove*.[152] The majority in that case pointed out that the normal measurement of tort damages, with the ultimate goal of compensating the plaintiff for his injuries, consists of "comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence."[153] Because that condition, barring the negligence, would have been nonexistence through the termination of the pregnancy, the court reasoned that the plaintiff was in effect asking the court to "measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination."[154]

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146. *Id.* at 431-32, 404 A.2d at 14.

147. For an interesting exception, see Siemieniec v. Lutheran Gen. Hosp., 117 Ill. 2d 230, 512 N.E.2d 691 (1987).

148. *See, e.g.*, Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983).

149. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 820, 165 Cal. Rptr. 477, 483 (1980).

150. The broad precedent set by *Roe v. Wade* appears to be in some danger at the moment. In the recently decided case of Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989), the Supreme Court found a Missouri statute banning the use of state employees and facilities for the performance of nontherapeutic abortions to be constitutional. In addition, three other "test" cases are currently before the Court: Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988) (en banc), *cert. granted*, 109 S. Ct. 3240 (1989); Akron Center for Reproductive Health v. Rosen, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd sub nom.* Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988), *appeal filed sub nom.* Ohio v. Akron Center for Reproductive Health, 57 U.S.L.W. 3378 (U.S. Nov. 29, 1988) (No. 88-805); Turnock v. Ragsdale, 841 F.2d 1358 (7th Cir.), *appeal filed*, 57 U.S.L.W. 3378 (U.S. Nov. 29, 1988) (No. 88-790). For a decidedly pro-choice discussion of these cases and the threat that they pose to *Roe v. Wade*, see Johnsen & Wilder, *Will* Roe v. Wade *Survive the Rehnquist Court*, 13 NOVA L. REV. 457 (1988-89).

151. *See infra* note 174 and accompanying text.

152. 49 N.J. 22, 227 A.2d 689 (1967).

153. *Id.* at 28, 227 A.2d at 692.

154. *Id.*

The "impossibility" of the *Gleitman* court has been analyzed as a "mixture of conceptual, legal, and normative or policy reasons"[155] which included, among other things, the difficulties of damages assessment.[156] By holding that the comparative valuation of nonexistence and impaired existence is beyond the experience and abilities of juries, the court concluded *as a matter of law* that no damages could be awarded.[157]

This rationale for rejecting the wrongful life claim has been justifiably attacked on several fronts. First, critics have questioned the basic assertion that damages in a wrongful life suit are somehow not ascertainable by pointing out that the problems of measurement in wrongful life claims are not all that different from those found in other cases involving intangible injuries, in which the value of extinguished lives, pain and suffering, and mental anguish has been readily ascertained and measured.[158] As one commentator suggests:

> [J]urors can never actually experience a plaintiff's life in its "normal" state before an injury or in the injured state that resulted from a defendant's actions. An imaginative leap is always required; the more severe the injury the greater the leap . . . . There may be some situations in which common understanding would lead to the conclusion that it would be better . . . never to have existed . . . and it is for the finder of fact to determine *just how much better* it would be.[159]

A final policy consideration in the awarding of damages is its deterrent effect on inappropriate behavior:

> The actual conduct of genetic screening, as such, is not regulated either by state or federal statutes. And the only general statutory provisions that have a significant impact on the screening process are those that restrict the practice of medicine to physicians and persons under their direct supervision . . . . Aside from these . . . forms of statutory control, it is the common law—judge-made law rather than legislator-made law—that will act as a regulator of the genetic screener, at least until more specific legislative regulatory schemes are devised.[160]

The difficulties created by a lack of clear standards for acceptable behavior could leave practitioners ambivalent about judicial findings of no liability; while they can breathe more easily with respect to immediate tort liability, "they may regret the lack of an opportunity to impose a legal duty on physicians to engage in genetic counseling and the performance of easily administered and inexpensive tests on the couple and the fetus."[161]

The courts in both *Harbeson v. Parke-Davis, Inc.*[162] and *Turpin v. Sortini*[163] recognized the strong public policy reasons supporting court recognition of the wrongful life claim. As noted by the *Harbeson* court, "the policies which

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155. Steinbock, *The Logical Case for "Wrongful Life,"* 16 HASTINGS CENTER REP., Apr. 1986, at 15, 17.
156. *Id.*
157. *Id.*
158. *See, e.g.*, Steinbock, *supra* note 155.
159. Capron, *supra* note 122, at 658-59.
160. Waltz, *The Liability of Physicians and Associated Personnel for Malpractice in Genetic Screening*, in GENETICS AND THE LAW 139, 140 (A. Milunsky & G. Annas eds. 1976).
161. Curran, *Tay-Sachs Disease, Wrongful Life, and Preventive Malpractice*, 67 AM. J. PUB. HEALTH 568, 568 (1977).
162. 98 Wash. 2d 460, 656 P.2d 483 (1983).
163. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

persuaded us . . . to recognize parents' claims of wrongful birth apply equally to recognition of claims of wrongful life. Imposition of a corresponding duty to the child will similarly foster the societal objectives of genetic counseling and prenatal testing, and will discourage malpractice."[164] While the burden imposed on a negligent party might seem unduly harsh, one commentator has stated that the means of avoiding liability in the first place is readily available:

> It is the disclosure of information, including the substantial areas of uncertainty, which provides a shield against liability. The practitioner who has not kept up with developments and still holds himself out as a genetic counselor is subject to the same risk of liability as any other medical practitioner in any field who falls short.[165]

Also troublesome in the *Gleitman* decision is what Justice Jacobs in his dissent to that case pointed out was the permitting of "a wrong with serious consequential injury to go wholly unredressed."[166] He stated that he could find "no substantial basis for the majority's notion that it would be 'impossible' . . . to deal properly with the matter of compensatory damages . . . . Indeed, even if there were more evaluation complexities than are truly present . . . they would not furnish any sound basis for the total denial of recovery."[167]

This equitable component of ascertaining damages has been expressed by the Supreme Court in *Story Parchment Co. v. Paterson Parchment Paper Co.*:[168]

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.[169]

The court in *Berman v. Allan*[170] stated its reluctance to follow *Gleitman* in denying recovery to a wrongful life plaintiff "solely because damages are difficult to ascertain."[171] It went on, however, to state that it too was denying an award to the plaintiff, not because damages existed that were unascertainable, but because the plaintiff had suffered *no* damages cognizable at law.[172] The *Berman* court thus stripped the "measurement of damages" argument down to its essence: a "sanctity of life" argument and a resulting preference for life, in any state, over nonlife.[173]

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164. *Harbeson*, 98 Wash. 2d at 481, 656 P.2d at 496.

165. Furrow, *Impaired Children and Tort Remedies: The Emergence of a Consensus*, 11 LAW, MED. & HEALTH CARE 148, 151 (1983).

166. Gleitman v. Cosgrove, 49 N.J. 22, 49, 227 A.2d 689, 703 (1967) (Jacobs, J., dissenting).

167. *Id.* at 50, 227 A.2d at 704.

168. 282 U.S. 555 (1931).

169. *Id.* at 563.

170. 80 N.J. 421, 404 A.2d 8 (1979).

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

172. *Id.* at 428-29, 404 A.2d at 12.

173. *Id.*

B. *"Sanctity of Life" Arguments*

1. *A Nonrebuttable Presumption*

As noted earlier, most of the rationales used by courts to reject wrongful life claims have been variations or extensions of a basic "sanctity of life" argument. As the court in *Phillips v. United States*[174] recognized:

> Although these arguments are phrased in varying terminology—the "impossibility" of determining damages based on a comparison of defective existence with nonexistence, . . . the absence of recognized damages, . . . the metaphysical, theological, or philosophical nature of the issues, . . .the lack of a "justiciable" issue, . . . or the absence of a legally "cognizable" cause of action, . . . —they essentially focus on the "preciousness of human life."[175]

While the main points of these arguments—that human life is precious and that our society benefits from a universal high regard for that life—are perfectly valid, proponents of the argument have refused to acknowledge those rare, but very real, conditions under which a rational person might reasonably choose nonexistence. By foreclosing even the possibility of such a position, the argument forces its nonrebuttable presumption on everyone, taking away any freedom to make individual life choices under sometimes difficult circumstances.

The first wrongful life case in which this usurpation occurred was *Gleitman v. Cosgrove*.[176] While the court used veiled versions of the argument to dismiss the infant plaintiff's wrongful life suit, it stated the argument outright as a basis for rejecting a wrongful birth suit by the infant's parents:

> It is basic to the human condition to seek life and hold on to it however heavily burdened. If Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects as against no life at all.[177]

Thus, the court used its "felt intuition" to determine, as a matter of law, that other reasonable persons could not find otherwise. This proposition seems unlikely, given the fact that three of the seven justices dissented from some aspect of the majority's opinion in the case.[178]

The court in *Berman v. Allan*[179] arrived at the same conclusion, but by a slightly different route. Starting off with the assertion that "[o]ne of the most deeply held beliefs of our society is that life—whether experienced with or without a major physical handicap—is more precious than non-life,"[180] the court then proceeded to gather "concrete manifestations"[181] of its belief. These manifestations included, among other things, "references to the sanctity of life"[182] in such documents as the federal and state constitutions and the Declaration of

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174. 508 F. Supp. 537 (1980).
175. *Id.* at 543.
176. 49 N.J. 22, 227 A.2d 689 (1967).
177. *Id.* at 30, 227 A.2d at 693.
178. However, only two judges, Jacobs and Schettino, dissented from the dismissal of the wrongful life claim.
179. 80 N.J. 421, 404 A.2d 8 (1979).
180. *Id.* at 429, 404 A.2d at 12.
181. *Id.*
182. *Id.*

Independence; the fact that "the most severe criminal penalties [are reserved] for individuals who have unjustifiably deprived others of life";[183] and the "high esteem which our society accords to those involved in the medical profession . . . [because] [p]hysicians are the preservers of life."[184]

The *Berman* court concluded by extending its sympathy to the infant plaintiff but simultaneously stated that "[w]e cannot, however, say that she would have been better off had she never been brought into the world."[185] The court thus appears to have misunderstood its role; reversing the dismissal of plaintiff's cause of action would not necessarily have shown agreement with the plaintiff's ultimate assertion, but merely would have acknowledged that the matter was one on which reasonable persons could disagree, and thus should be decided by the trier of fact. Once again, however, the court (less one dissenting voice)[186] foreclosed that possibility.

2. *A Better Approach: A Rebuttable Presumption*

Similar judicial resistance to the notion that a person could reasonably prefer nonexistence to an impaired existence in some circumstances has been found in so-called "right to die" cases.[187] A real danger existed that seriously ill individuals who wished to exercise their private choice not to continue an existence that they found to be painful and intolerable, but who were at the mercy of the courts in the exercise of their choice because of physical incapacity or some other reason, would be forced to endure existence because of the court's strong preference for continued life. However, as pointed out by one commentator, these "[o]ther types of cases involving existence-versus-nonexistence policy considerations have not adopted the irrebuttable presumption espoused in 'wrongful life' decisions that life is always preferred over nonexistence."[188] Rather, there has developed a rebuttable presumption that life is preferable, with the burden then on the plaintiff to show otherwise. Once the courts have allowed for at least the possibility that nonexistence can be shown in a given circumstance to be preferable over existence, plaintiffs who have valid positions have been permitted to demonstrate them.

For instance, the court in *Bouvia v. Superior Court*,[189] in ordering the removal of a nasogastric feeding tube from a competent cerebral palsy victim at her request (even though it would lead to her death by starvation), stated its agreement with the plaintiff that it was error to attach "undue importance to the *amount of time* possibly available" rather than "to give equal weight and consideration for the *quality* of that life; an equal, if not more significant, con-

183. *Id.*

184. *Id.* at 430, 404 A.2d at 13.

185. *Id.*

186. Judge Handler provided the only dissent concerning the wrongful life claim, although the court was more evenly divided on the issue of the parents' wrongful birth claim.

187. *See, e.g., In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

188. Comment, *supra* note 33, at 495.

189. 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986).

sideration."[190] The court also paid deference to the plaintiff's personal and reasonable determination that

> the quality of her life has been diminished to the point of hopelessness, uselessness, unenjoyability, and frustration . . . . If her right to choose may not be exercised because there remains to her, in the opinion of a court, . . . a certain arbitrary number of years, . . . her right will have lost its value and meaning.[191]

Finally, the court concluded by noting that "[i]t is incongruous, if not monstrous, . . . to assert [the] right to preserve a life that someone else must live, or, more accurately, endure . . . . We cannot conceive it to be the policy of this state to inflict such an ordeal upon anyone."[192]

Cases such as *Bouvia* have demonstrated that, at least in some situations, courts are willing to acknowledge the possibility that nonexistence might reasonably be preferable for some over a seriously impaired life.[193] This is an important first step for wrongful life claims, where the court's open-mindedness would result in at least a "day in court" for the plaintiff, rather than a preclusion of that possibility as a matter of law. Plaintiffs who have suffered the worst injuries would thus be allowed to distinguish their special circumstances, as well as the special claim that they assert.

V. A Proposed Solution

It must first be recognized that while the courts have erred in their rationales for rejecting wrongful life claims, many of these claims were nevertheless properly quashed. It is only in a small number of cases, when the impairment was so severe that the burden of life might truly have exceeded its benefit, that rejection of the claims has been wrong. These plaintiffs never had their "day in court," a chance to show how their plight is different from that of the rest.

Various solutions have been proposed in order to overcome the courts' continuing hostility toward the wrongful life cause of action.[194] One commonly proposed solution would take the claim of a wrongful life plaintiff on its face, but would then require the plaintiff to prove the "net burden" of his life. As will be seen, while this solution is logically and legally consistent, it is also somewhat unsatisfying emotionally. Perhaps that is the only possible result, given the tragic context of these claims.

A. *Showing a Valid Cause of Action*

To avoid early dismissal for failure to state a valid cause of action, a wrongful life plaintiff would first have to show the traditional negligence elements, starting with a duty from the defendant to the plaintiff, either direct or "derivative," and a breach of that duty. The plaintiff would also have to show

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190. *Id.* at 1142, 225 Cal. Rptr. at 304.
191. *Id.* at 1142-43, 225 Cal. Rptr. at 304-05.
192. *Id.* at 1143-44, 225 Cal. Rptr. at 305.
193. Note, *supra* note 25, at 223-24.
194. *See, e.g.*, Morreim, *The Concept of Harm Reconceived: A Different Look at Wrongful Life*, 7 LAW & PHIL. 3 (1988-89) (call for a new and broader definition of "harm").

the element of causation; that is, that absent the negligence of the defendant, the plaintiff's parents would have chosen either not to conceive the plaintiff or to terminate the pregnancy. To satisfy this requirement, courts might either impose a "reasonable person" standard or demand convincing evidence of what the parents would have chosen.

Up to this point, the proposed solution is similar to that currently used by most courts. A key difference in the proposed scheme, however, would be a change in the presumption of the court as to what constitutes a legal "injury." Rather than a nonrebuttable presumption that no possible condition of life could be worse than nonexistence, and thus, that no injury could have been suffered by the plaintiff, the court would adopt a rebuttable presumption of preference for life. This presumption would be similar to that used in "right to die" cases and would allow the plaintiff to present the particulars of his claim before the trier of fact.

A mathematical scheme has been developed that helps illustrate the change in focus.[195] Under the nonrebuttable presumption in favor of life used by most courts, nonexistence is given a negative value, life without defects is given a high positive value, and life impaired by defects is given a lower, but still positive, number. A comparison of the values reveals that nonexistence can thus never be ranked higher than any state of life, even that which is most impaired. This result seems counterintuitive, especially in the contexts of "right to die" cases and the most severe wrongful life cases. That is, these cases involve conditions under which nonexistence could perhaps reasonably be preferred.[196]

The proposed scheme would have a different assignment system. Nonexistence would be valued at zero, while life without defects would retain its high positive value. Life impaired with defects would be assigned values in a range spanning from positive numbers just below that assigned to life without defects, down to negative values for the most serious of impairments. While most impaired conditions would still fall above nonexistence in value and thus result in no real injury, others that were the most severe and tragic, symbolized by negative numbers, would fall below the value of nonexistence and would thus be classified as an injury.

To avoid the "open floodgates" possibility that the *Zepeda* court feared so much, the injury alleged would have to be a physical one, such as genetic or congenital impairment, and not merely an "impaired status" injury such a illegitimacy. This distinction of the *Curlender* court seems valid, considering the

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195. Note, *supra* note 46, at 64-66. It is important to keep in mind that the mathematical values used in this scheme are not to be used in actual calculation of damages. The only significance of the values is in their relationships to others, for mere ease of conceptualization.

196. Joel Feinberg, a leading commentator on the issue of harm, has formulated a hypothetical to demonstrate how such an analysis might be carried out:

> Suppose that after the death of your body a deity appears to you and . . . proposes to you an option. You can be born again after death (reincarnated), but only as a Tay-Sachs baby with a painful life expectancy of four years to be followed by a permanent extinction, or you can opt for permanent extinction to begin immediately. I should think you would have to be crazy to select the first option.

Feinberg, *Wrongful Life and the Conterfactual Element in Harming*, 4 SOC. PHIL. & POL'Y 145, 164 (1989), *quoted in* Peters, *Protecting the Unconceived: Nonexistence, Avoidability, and Reproductive Technology*, 31 ARIZ. L. REV. 487, 499 (1989).

more ephemeral nature of "status" impairments and the likelihood that they can be reversed. In contrast, the physical injuries resulting from severe defects are likely to remain throughout the plaintiff's life.

B. *Showing Damages*

The wrongful life plaintiff must then show a trier of fact that his life was truly wrongful to him—that is, the burdens of his life outweigh the benefits he has received. This formula approach derives from the "benefit rule" doctrine of tort law, which states that "when the defendant's tortious conduct has caused harm to the plaintiff . . . and . . . has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit that was conferred is considered in mitigation of damages, to the extent that this is equitable."[197] As has been pointed out, juries are frequently called upon to measure damages for intangible injuries such as wrongful death, pain and suffering, and loss of consortium. The same measuring would take place in the wrongful life context.

The trier of fact would first measure the amount of burden that the impairment has inflicted on the plaintiff. Next, the same measurement would be made of the benefits that the plaintiff could expect to derive from his existence, despite the impairment. The difference in these two values, assuming that the burdens outweighed the benefits, would be the general damages recoverable by the plaintiff. If the result of the comparison was a net benefit, the plaintiff would collect nothing under the theory that overall, he has suffered no injury by being born. Thus, general damages such as pain and suffering would be available under this proposed scheme, exactly as they would be in other tort actions. Special damages for medical expenses, education, and training would also be available under the usual rules for compensation.

C. *Effects on Plaintiffs*

This scheme would reward some plaintiffs who are currently ignored by the courts while reducing or eliminating the awards of other plaintiffs who have received limited special damages in certain jurisdictions.

The "status-impaired" plaintiff would still be unable to state a valid cause of action and thus would be denied recovery. The plaintiff who is only slightly impaired and who expects a reasonably normal and functional life would also not recover; most, if not all, reasonable persons would agree that the net balance of such a life would be in favor of the benefits derived. This plaintiff would receive neither general nor special damages, because the acts of the defendant did not inflict a real injury. This result goes against the approach of the three jurisdictions that currently recognize a limited cause of action for wrongful life, but seems to be a truer judgment of the plaintiff's asserted wrongful life claim.

On the other hand, certain plaintiffs who have suffered the most severe impairments, such as Tay-Sachs disease or polycystic kidney disease, which present the prospect of only a limited lifespan filled with intense pain and suffering,

197. Rogers, *supra* note 28, at 739 (quoting RESTATEMENT (SECOND) OF TORTS § 920 (1977)).

could recover damages under the proposed system. These plaintiffs, who are in the best position to demonstrate that their lives have been a "net burden" to them, should be able to recover for general and special damages. Ironically, however, the tragic state in which these plaintiffs exist often makes the damage awards largely useless to them. Nothing can soften the pain of those still suffering; others have already died from their acquired afflictions. Other purposes will have been served, however, not the least of which will be a deterrent effect on other negligent practitioners.

VI. CONCLUSION

Court analysis of wrongful life claims has been an area of constant change, where public policies and societal views have often changed more quickly than the law. Recognition of the sanctity of human life is the cornerstone of civilization and thus should not be minimized. However, advances in technology have led to some circumstances in which tragedies formerly suffered silently can now be avoided through pre- and postconception testing, the deliberate choice of potential parents not to conceive, or the termination of an impaired fetus. Love and respect for life should not prevent the doing of whatever is possible to ensure that life remains worth living.

The courts have begun with a love of life, but have turned it into a nonrebuttable presumption forced on anyone who would express an individual preference for something other than continued existence and suffering. While this attitude of the courts has softened somewhat in "right to die" cases, it remains firm in other areas. As noted by Justice Flaherty in *Speck v. Finegold*,[198] such an attitude can inadvertently lead to harsh results:

> Those holding such views are apparently able to overlook what is plain to see: that—in cases such as this—a diseased plaintiff exists and, taking the allegations of the complaint as true, would not exist at all but for the negligence of the defendants. Existence in itself can hardly be characterized as an injury, but when existence is foreseeably and inextricably coupled with a disease, such an existence, depending upon the nature of the disease, may be intolerably burdensome. To judicially foreclose consideration of whether life in a particular case is such a burden would be to tell the diseased, possibly deformed plaintiff that he can seek no remedy in the courts and to imply that his alternative remedy, in the extreme event that he finds his life unduly burdensome, is suicide. No court in the land would directly send such a message to these plaintiffs. We deem it unfortunate that some courts have indeed sent that message by implication.[199]

A step in the right direction would be a softening of the presumption that life is always preferable to nonexistence in wrongful life cases. By allowing the most severely impaired plaintiffs to have their "day in court," the best interests of all would be better served.

Timothy J. Dawe

198. 497 Pa. 77, 439 A.2d 110 (1981).
199. *Id.* at 87, 439 A.2d at 115.