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Comments: The Cost of Living: Maryland's Refusal to Recognize the Wrongful Life Cause of Action Short-Changes Plaintiffs

T. Brendan Kennedy
University of Baltimore School of Law

THE COST OF LIVING: MARYLAND'S REFUSAL TO RECOGNIZE THE WRONGFUL LIFE CAUSE OF ACTION SHORT-CHANGES PLAINTIFFS

I. INTRODUCTION

Since the earliest days of recorded history the mystery of human existence has confounded philosophers, theologians, and every person who finds cause to examine their being. From such contemplation flows a myriad of puzzling questions, as deep and as wide as the consciousness allows, begging consideration of when life begins and ends, demanding reflection on life itself to determine the value of existence. Without doubt, the answers are found individually, determined against the context of one's own existence, necessarily involving an evaluation drawing on the socioeconomic, moral, philosophical and theological forces that shape the world. Yet, in a civilized society, such individual metaphysical contemplation takes place within, and is shaped by, a system of laws designed for application against the conduct of the masses.

In the microcosm of medical malpractice tort law, the intersections of self-determination with prevailing legal principles present theoretical dilemmas for courts of law. One such dilemma is whether or not a claim for wrongful life is valid.[1] Determination of this issue calls for a headfirst dive into a quagmire filled with questions concerning fetal rights, surrogate decision-making, and liability for negligent conduct.[2] The social underpinnings associated with a cause of action for wrongful life create a judicial reticence, resulting in a majority view that is weakened by a lack of uniformity and a minority view that stretches traditional tort theories to extend economic relief, acknowledging the burdensome expense of an impaired existence.[3]

Absent authority from the United States Supreme Court, states are left to develop their own body of jurisprudence in accordance with the statutory scheme in place within each jurisdiction, and any relevant common law precedent. This comment examines Maryland's treatment of the wrongful life cause of action as addressed by that jurisdiction for the first time in *Kassama v. Magat*.[4] Part II reviews the evolution of wrongful life and other related causes of action, the treatment of wrongful life claims in other jurisdictions, and the common

1. *See infra* Part II.A.
2. *See infra* Part II.A-B.
3. *See infra* Part II.B.
4. 136 Md. App. 637, 767 A.2d 348 (2001), *aff'd*, 368 Md. 113, 792 A.2d 1102 (2002).

law and statutory scheme in place in Maryland. Part III focuses on the facts and legal doctrine involved in *Kassama v. Magat*, analyzes the relevant precedent and statutes, and addresses tort principles applied to medical malpractice claims under Maryland law. Part IV of the comment considers the need for post-majority damages, evaluates arguments, for and against recognition of wrongful life claims, and concludes that Maryland's refusal to recognize the wrongful life cause of action leaves plaintiffs with a theoretical claim, yet no remedy at law.

II. BACKGROUND

A. *Overview of Wrongful Life and Related Causes of Action*

Sounding in medical malpractice tort law,[5] wrongful life is a cause of action brought on behalf of a child plaintiff seeking damages on a theory that, but for the negligence[6] of a medical provider, the child would not have been born.[7] This cause of action parallels a more widely recognized[8] cause of action owned by the parents of a child born as a result of the negligence of the medical provider, termed wrongful birth.[9] The controversy surrounding these claims is that the theory for recovery stands on the supposition that the parents would rather terminate the pregnancy than run the risk of giving birth to a defective child.[10]

Other related causes of action, such as wrongful conception[11] and wrongful diagnosis,[12] add to the body of jurisprudence that precipitates claims for wrongful life.[13] Yet, the United States Supreme

5. *See* Becker v. Schwartz, 386 N.E.2d 807, 811 (N.Y. 1978).
6. The negligence giving rise to wrongful life or wrongful birth claims generally arises from a lack of full disclosure of the various risks associated with pregnancy, when such failure deprives the parents of the choice to terminate the pregnancy. *See* Turpin v. Sortini, 643 P.2d 954, 955 (Cal. 1982); Procanik v. Cillo, 478 A.2d 755, 760 (N.J. 1984); *Becker*, 386 N.E.2d at 808-09.
7. Michael A. Berenson, Comment, *The Wrongful Life Claim—The Legal Dilemma of Existence Versus Nonexistence: "To Be or Not To Be,"* 64 TUL. L. REV. 895, 897 (1990).
8. *See* Kassama v. Magat, 136 Md. App. 637, 665, 767 A.2d 348, 363 (2001); Viccaro v. Milunsky, 551 N.E.2d 8, 10 (Mass. 1990).
9. *See* Reed v. Campagnolo, 332 Md. 226, 228, 630 A.2d 1145, 1146 (1993); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 487 (Wash. 1983).
10. *See Becker*, 386 N.E.2d at 810.
11. *Id.* (explaining that a wrongful conception claim occurs when "parents, one of whom has undergone an unsuccessful surgical birth control procedure, have sought damages for the birth of an unplanned child").
12. *Id.* at 811 (explaining that a wrongful diagnosis claim occurs when the birth of a child is attributable to a "wrongful diagnosis" of an existing pregnancy, "resulting in the deprivation of the mother's choice to terminate the pregnancy within the permissible time period").
13. This comment does not consider wrongful birth, wrongful conception or wrongful diagnosis at length.

Court's decision in *Roe v. Wade*[14] provides the impetus for pregnancy and birth-related causes of action through the protection of abortion,[15] creating an option for parents of would-be birth defective children to terminate the pregnancy,[16] avoiding considerable financial expense and emotional distress.[17] In addition, advancements in genetic counseling enable determination of the likelihood of delivering a birth defective child; in utero diagnosis of genetic defects; and the potential to treat and correct genetic defects during pregnancy.[18] Against this backdrop, courts now must confront the validity of the wrongful life cause of action.

B. Split of Authority

The law of prenatal torts has evolved rapidly since the decision in *Roe*.[19] To date, a significant majority of jurisdictions, twenty-eight states,[20] do not recognize wrongful life as a valid cause of action.[21]

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14. 410 U.S. 113 (1973).
15. *Id.; see also* Kassama v. Magat, 368 Md. 113, 134-35, 792 A.2d 1102, 1115 (2002).
16. *See Procanik*, 478 A.2d at 759 ("Relying on *Roe v. Wade* . . . the Court found that public policy now supports the right of a woman to choose to terminate a pregnancy.") (citations omitted) (discussing *Berman v. Allan*, 80 N.J. 421 (1979)); *see also* Bernadette Kennedy, Comment, *The Trend Toward Judicial Recognition of Wrongful Life: A Dissenting View*, 31 UCLA L. REV. 473, 490-91 (1983) (discussing the public policy change resulting from *Roe v. Wade*).
17. *See Procanik*, 478 A.2d at 759.
18. *See* Thomas A. Warnock, Comment, *Scientific Advancements: Will Technology Make the Unpopular Wrongful Birth/Life Causes of Action Extinct?*, 19 TEMP. ENVTL. L & TECH. J. 173, 184 (2001); *see also* Susan Jenks, *In Utero Gene Therapy Is Still a Distant Promise*, 91 J. NAT'L CANCER INST. 829, 830 (1999).
19. *See* Reed v. Campagnolo, 332 Md. 226, 231, 630 A.2d 1145, 1147 (1993); Kassama v. Magat, 136 Md. App. 637, 665, 767 A.2d 348, 363 (2001); Vicarro v. Milunsky, 551 N.E.2d 8, 10 (Mass. 1990); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 487 (Wash. 1983); *see also Berenson, supra* note 7, at 897; *see also supra* notes 14-17 and accompanying text.
20. *Kassama*, 368 Md. at 137, 792 A.2d at 1116 (explaining that eighteen states invalidate wrongful life through case law and ten states proscribe the claim by statute).
21. *See* Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); Walker by Pizano v. Mart, 790 P.2d 735 (Ariz. 1990); Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988); Garrison v. Medical Ctr. of Del. Inc., 581 A.2d 288 (Del. 1989); Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992); Blake v. Cruz, 698 P.2d 315 (Idaho 1984); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987); Cowe v. Forum Group, Inc., 575 N.E.2d 630 (Ind. 1991); Bruggeman v. Schimke, 718 P.2d 635 (Kan. 1986); Pitre v. Opelousas Gen. Hosp., 517 So. 2d 1019 (La. Ct. App. 1987), *aff'd in part and rev'd in part on other grounds*, 530 So. 2d 1151 (La. 1988); Viccaro v. Milunsky, 551 N.E.2d 8 (Mass. 1990); Strohmaier v. Assocs. in Obstetrics & Gynecology, P.C., 332 N.W.2d 432 (Mich. Ct. App. 1982); Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988); Greco v. United States, 893 P.2d 345 (Nev. 1995); Smith v. Cote, 513 A.2d 341 (N.H. 1986); *Becker*, 386 N.E.2d at 807; Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985); Flanagan v. Williams, 623 N.E.2d 185 (Ohio Ct. App. 1993); Ellis v. Sherman, 515 A.2d 1327 (Pa. 1986); Nelson v. Krusen, 678

Over the past twenty years, eight state legislatures acted to proscribe wrongful life as a cause of action.[22] Representing the minority, three states allow recovery for wrongful life at common law.[23] Of the three states in the minority, two have enacted legislation acknowledging the validity of the wrongful life cause of action.[24]

1. Majority View

Though facially the weight of authority falls heavily against recognizing wrongful life, a more critical examination reveals a majority weakened by reliance on flawed public policy considerations due to a consistent lack of solid rationale.[25] Analysis under the traditional tort framework[26] primarily challenges proponents of wrongful life claims to establish the legitimacy of the elements of causation and damages.[27] Moreover, in the context of wrongful life, the judiciary acknowledges the limitations of applying traditional legal principles to theories of recovery so closely tied to public policy.[28]

S.W.2d 918 (Tex. 1984); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

22. *See* IDAHO CODE § 5-334 (Michie 2000) (enacted 1985); IND. CODE ANN. § 34-12-1-1 (Michie 2001) (adopted 1998); ME. REV. STAT. ANN. tit. 24 § 2931 (West 2000) (invalidating wrongful life cause of action when child is born healthy); MICH. COMP. LAWS ANN. § 600.2971 (West 2001); MINN. STAT. § 145.424 (West 2000) (effective 1982); MO. ANN. STAT. § 188.130 (West 2000) (enacted 1986); N.D. CENT. CODE § 32-03-43 (2001) (adopted 1985); 42 PA. CONS. STAT. § 8305(B) (West 2001) (effective 1988); S.D. CODIFIED LAWS § 21-55-1 (Michie 2001) (effective 1981); UTAH CODE ANN. § 78-11-24 (2001) (adopted 1983).
23. *See Turpin*, 643 P.2d at 960; *Procanik*, 478 A.2d at 760; *Harbeson*, 656 P.2d at 486.
24. In 1981, California enacted section 43.6 of its civil code, which bars a cause of action against a parent for wrongful life. Additionally, the statute denies the failure to prevent the live birth of a child as a defense against third parties, and from consideration in damage awards. CAL. CIV. CODE § 43.6 (West 2001). The *Turpin* court noted that the purpose of the legislation was to "eliminate any liability or other similar economic pressure which might induce potential parents to abort or decline to conceive a potentially defective child." *Turpin*, 643 P.2d at 959. In the state of Washington, though not expressly addressed by statute, the validity of the wrongful life cause of action at common law is acknowledged in the annotations of its revised code. Such sections include; section 7.70.040, which outlines the elements needed to prove injury resulting from a breach of the duty of care, section 7.70.050, which addresses elements of proof in an action for lack of informed consent, and section 4.24.290, which codifies the standard of proof in an action for damages on a theory of professional negligence.
25. *See supra* note 21.
26. *See Becker*, 386 N.E.2d at 811. Duty, breach, causation and injury comprise the elements of the traditional tort framework utilized by the courts surveyed. *Id.*
27. *See infra* notes 30-32 and accompanying text.
28. *Becker*, 386 N.E.2d at 810. Noting that:

> It borders on the absurdly obvious to observe that resolution of [the wrongful life] question transcends the mechanical application

Jurisdictions adopting the majority position point to three areas of weakness within the tort framework of a plaintiff's cause of action for wrongful life. Varied in accordance with each state's own common law,[29] courts place weight on lack of causation,[30] absence of a legal injury,[31] and the impossibility of calculating damages,[32] individually or in combination, to invalidate wrongful life as a cause of action.[33]

The interdependence of the elements involved in the tort framework blurs analysis when applied to wrongful life causes of action. Stymied by the weakness of theoretical injuries,[34] some courts stop short of contemplating damages, resting on the lack of causation as the basis for invalidating the plaintiff's cause of action.[35] These jurisdictions acknowledge the existence of the child as a result of the physician's negligence only inasmuch as the parents' wrongful birth claim is concerned.[36] Analysis of the child's claim, however, shifts scrutiny to the *cause* of the child's impairment, not the child's existence.[37] Whereas in a claim for wrongful birth, parents may recover for the expense associated with raising a genetically defective child where the

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> of legal principles. Any such resolution, whatever it may be, must invariably be colored by notions of public policy, the validity of which remains, as always, a matter upon which reasonable men may disagree.

Id.

29. *See Pitre*, 517 So. 2d at 1022-23; Taylor v. Kurapati, 600 N.W.2d 670, 682-84 (Mich. Ct. App. 1999); *Procanik*, 478 A.2d at 758-60.
30. *See Ellis*, 515 A.2d at 1329 ("The condition was caused not by another, but by natural processes.") (emphasis omitted); *see also Garrison*, 581 A.2d at 288; James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985).
31. *See Elliott*, 361 So. 2d at 548; Walker v. Mart, 790 P.2d 735, 740 (Ariz. 1990); *Lininger*, 764 P.2d at 1210; *Garrison*, 581 A.2d at 293; *Blake*, 698 P.2d at 322; *Siemieniec*, 512 N.E.2d at 700; *Cowe*, 575 N.E.2d at 635; *Pitre*, 517 So. 2d at 1024-25; *Smith*, 513 A.2d at 355; *Flanagan*, 623 N.E.2d at 191; *Nelson*, 678 S.W.2d at 925; *Beardsley*, 650 P.2d at 290.
32. *Strohmaier*, 332 N.W.2d at 435; *Wilson*, 751 S.W.2d at 743 (quoting Martin A. Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 FAM. L.Q. 15, 40 (1980), and Thomas Rogers III, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C. L. REV. 713, 729-30 (1982)); *Greco*, 893 P.2d at 347; *Becker*, 386 N.E.2d at 807; *Dumer*, 233 N.W.2d at 376.
33. *See Garrison*, 581 A.2d at 293-94; James G. v. Coserta, 332 S.E.2d 872, 879-81 (W. Va. 1985).
34. *Garrison*, 581 A.2d at 294 ("We concur with the view that the question of whether it would have been better for an impaired child to never have lived at all is a philosophical one not amenable to judicial resolution.").
35. *Id.* at 293 ("There may be a causal link between defendants' negligence and the child's existence, but not between that negligence and her impaired condition."); *Ellis*, 515 A.2d at 1329 ("The condition . . . was inflicted upon the plaintiff not by any person, but by the plaintiff's genetic constitution . . . . *The condition was caused not by another*, but by natural processes.").
36. For wrongful birth, the cause of injury is the doctor's negligence that strips the parents of their right to choose, thereby causing the child to come into existence. *See Berenson*, *supra* note 7, at 899; *see also Garrison*, 581 A.2d at 290; *Ellis*, 515 A.2d at 1329-30.
37. *See supra* note 7 and accompanying text.

injury stems from the negligence of the physician; jurisdictions not recognizing wrongful life, however, create an illogical scenario in which a child may not recover on the same facts as her parents. Thus, the two claims are distinguished more so on damages than causation.[38]

A more solid rationale employed by many jurisdictions invalidates wrongful life due to the absence of a legally cognizable injury.[39] Most courts do not acknowledge a legal right to be born.[40] Thus, those courts hold that without a right to be born, the child cannot suffer an injury from birth.[41] This syllogism bears out the child's inability to "prove injury at the hands of the doctor," by recognizing that "[c]hildren . . . have neither the ability nor the right to determine questions of conception, termination of gestation, or carrying to term."[42] The strength of this position flows from the theoretical inability to recognize a right to be born without invading upon, or invalidating, a mother's autonomy in determining reproductive matters.[43] True examination of the issue, however, cannot stop here. Due to advancements in medicine and the corresponding rise in the standard of care owed to patients, once born, a right to access the courts inures in the child, thus enabling a child plaintiff to take action against a negligent tortfeasor.[44] Such is the case in Maryland, where claims by minor plaintiffs arising from birth-related matters are recognizable at common law.[45]

The theoretical undoing of the wrongful life cause of action within the traditional tort framework culminates in the inability of courts to adequately determine the amount of damage incurred.[46] At bottom, the plaintiff's claim is premised on the assertion that, but for the doctor's negligence, the child would not have been born and therein would not "experience the pain and suffering attributable to" life with

38. *See* Taylor v. Kurapati, 600 N.W.2d 670, 684 (Mich. Ct. App. 1999).
39. *See supra* note 31.
40. *Beardsley*, 650 P.2d at 289. *See generally* Roe v. Wade, 410 U.S. 113 (1973) (implying no right to be born).
41. *Beardsley*, 650 P.2d at 289.
42. *Walker*, 790 P.2d at, 740 (Ariz. 1990).
43. *See* Hon. George A. Brown, *Wrongful Life: A Misconceived Tort-An Introduction*, 15 U.C. DAVIS L. REV. 445, 447 (1981) (discussing conflict and confusion between claims for wrongful life and wrongful birth). Legal theory precludes the concurrent recognition of both a right to be born and a right to an abortion. For, if a right to be born is recognized, and a pregnancy is aborted, a legal wrong occurs for which a cause of action inures in the unborn child.
44. *See* Damasiecwicz v. Gorsuch, 197 Md. 417, 441, 79 A.2d 550, 561 (1951).
45. *See* Kassama v. Magat, 368 Md. 113, 134, 792 A.2d 1102, 1114 (2002); *see also* Group Health Ass'n v. Blumenthal, 295 Md. 104, 119, 453 A.2d 1198, 1207 (1983); State v. Sherman, 234 Md. 179, 184, 198 A.2d 71, 73 (1964); *Damasiecwicz*, 197 Md. at 439, 79 A.2d at 560.
46. *See Becker*, 386 N.E.2d at 812.

the genetic defect.[47] Thus, the determination of an award "demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence."[48]

At this point, some courts find themselves afloat in a tumultuous sea of countervailing policy considerations that motivate the judiciary to abandon the search for a legal remedy, deferring resolution of the matter to the legislature.[49] Foremost in the mind of the judiciary seems to be the public policy supporting the preciousness of human life.[50] The sanctity of life argument packages the notion that life, in any condition or form, holds intrinsic value.[51] Other policy considerations include the public perception, sensitivity to and treatment of defective humans,[52] as well as line-drawing considerations.[53]

2. Minority View

At least three states, California, Washington and New Jersey, have recognized wrongful life as a valid cause of action, albeit in a limited form.[54] These jurisdictions modify the tort analysis, only allowing re-

47. Bruggeman v. Schimke, 718 P.2d 635, 638 (Kan. 1986).

48. *Becker*, 386 N.E.2d at 812.

49. *See, e.g., Siemieniec*, 512 N.E.2d at 702; *Cowe*, 575 N.E.2d at 635; *Pitre*, 517 So. 2d at 1025.

50. *Bruggeman*, 718 P.2d at 639-40 ("Basic to our culture is the precept that life is precious. As a society, therefore, our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence.") (quoting *Blake*, 698 P.2d at 322).

51. *See Bruggeman*, 718 P.2d at 640 ("life - whether experienced with or without a major physical handicap - is more precious than non-life") (quoting Berman v. Allan, 404 A.2d 8, 12 (N.J. 1979)); *see also Flanagan*, 623 N.E.2d at 191.

52. *See Smith*, 513 A.2d at 353 (quoting Geoffrey D. Minnot & Vincent P. Zurzolo, Comment, *Wrongful Life: A Misconceived Tort*, 15 U.C. DAVIS L. REV. 447, 459-60 (1981) (footnotes omitted)). The court noted:

> [Disabled persons] also face subtle yet equally devastating handicaps in the attitudes and behavior of society, the law, and their own families and friends. Furthermore, society often views disabled persons as burdensome misfits. Recent legislation concerning employment, education, and building access reflects a slow change in these attitudes. This change evidences a growing public awareness that the handicapped can be valuable and productive members of society.

Smith, 513 A.2d at 353.

53. In *Siemieniec*, the court noted:

> Judges and juries will have to determine the degree of impairment that renders a child's nonexistence preferable to existence. Not only will such a judgment be unpalatable, but persons making this judgment can look only to their own feelings or fears of being handicapped in deciding the merits of the claim.

Siemieniec, 512 N.E.2d at 699-700.

54. *See Turpin*, 643 P.2d at 954; *see also Procanik*, 478 A.2d at 755; Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983).

covery of special damages related to the extraordinary cost of medical care attributable to the malady.[55]

Adherence to the core principles of tort law enables the minority jurisdictions to rebut the policy considerations to which the majority of jurisdictions ultimately succumbed.[56] The wrongful life cause of action flows from the acceptance at common law of the premise that the duty of care owed by a physician extends to the fetus.[57] In assessing the existence of a legal injury and the extent of damages, a minority of courts agree with the premise underlying the majority's denial of the cause of action, that "measuring the value of an impaired life as compared to nonexistence is a task that is beyond mortals, whether judges or jurors."[58] Yet, the minority courts each determine that the inability to assess general damages is not fatal.[59] Thus, the minority allows the plaintiff child to recover only those special damages attributable to the extraordinary cost of her affliction.[60] Special damages are quantifiable[61] and allow the courts to vindicate the "dual objectives of [the] tort system: the compensation of injured parties and the deterrence of future wrongful conduct."[62] Furthermore, these courts limit the recovery of such damages to a single plaintiff,[63] acknowledging the possibility that the child's parents may or may not be available to recover for pre-majority damages.[64]

C. *Maryland Common Law Recognizes Wrongful Conception and Wrongful Birth Claims*

The common law landscape in Maryland includes prenatal tort claims for wrongful conception[65] and wrongful birth.[66] Critical analy-

55. *Turpin*, 643 P.2d at 966; *Procanik*, 478 A.2d at 757; *Harbeson*, 656 P.2d at 497.
56. *See Turpin*, 643 P.2d at 965-66; *Harbeson*, 656 P.2d at 495-96.
57. *Procanik*, 478 A.2d at 760 ("[T]he defendant doctors do not deny they owed a duty to the infant plaintiff, and we find such a duty exists."); *Harbeson*, 656 P.2d at 495 ("Prenatal injuries to a fetus have been recognized as actionable in this state for 20 years. . . . We now hold . . . a duty may extend to persons not yet conceived . . . ."); *see also Turpin*, 643 P.2d at 960.
58. *Harbeson*, 656 P.2d at 496.
59. *Turpin*, 643 P.2d at 963 (addressing the extent of damages from a practical standpoint, by denying only general damages due to the impossibility to rationally determine if a child indeed suffered an injury in being born impaired instead of not being born at all, and due to the lack of "any fair, nonspeculative" method of calculating general damages); *Procanik*, 478 A.2d at 763 (focusing solely on the "needs of the living" instead of being stymied by the "philosophical problem of finding that such a defective life is worth less than no life at all"); *Harbeson*, 656 P.2d at 496.
60. *See Turpin*, 643 P.2d at 965; *Procanik*, 478 A.2d at 762; *Harbeson*, 656 P.2d at 496-97.
61. *Procanik*, 478 A.2d at 762.
62. *Id.* at 764.
63. *See id.* at 762.
64. *Turpin*, 643 P.2d at 965; *Procanik*, 478 A.2d at 762.
65. Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (1984).
66. Reed v. Campagnolo, 332 Md. 226, 630 A.2d 1145 (1993).

sis of the evolution of these related causes of action in Maryland reveals tort principles and policy considerations relied upon by the judiciary.[67]

1. Prenatal Injuries

Damasiewicz v. Gorsuch marks the genesis of the common law regarding prenatal injuries in Maryland.[68] In that case, the Court of Appeals of Maryland held that a child injured prior to birth may maintain an action for damages against the negligent party.[69] To arrive at this decision, the court studied the early common law of England and Ireland regarding the right to inherit legal claims, and whether or not legal rights inure in unborn children for the purposes of tort actions, and if so, at what point.[70] The court then turned to a survey of similar claims adjudicated in other jurisdictions within the United States.[71]

Confronted with authority on either side, the court categorized the cases as adhering to either the position implied by Lord Coke or an alternate stance that relies on advances in medical science and general knowledge. The first position acknowledges the inheritance of legal rights in children *after* birth, while the latter uses medical science and general knowledge in determining a prenatal right of action.[72] Before determining the issue, the court dismissed lesser arguments attacking recognition of a child's legal claim for prenatal injuries on the basis that medical science will divine baseless claims from the legitimate, and will necessarily weigh on the ability of plaintiffs to prove their claim.[73] Breaking free from an antiquated majority position,[74] the Court of Appeals of Maryland approached the issue in terms of rights; accepting the argument that the "child does not continue until birth to be a part of its mother," and as such has independent rights, inuring upon viability and exercisable at birth.[75] Thus, the Court of Appeals of Maryland, reversing the trial court, held that a child has the right to sue for injuries suffered prior to birth.[76]

2. Wrongful Conception

In *Jones v. Malinowski*, the Court of Appeals of Maryland recognized a cause of action for the parents of a healthy child born as the result

67. *See Reed*, 332 Md. at 232-35, 630 A.2d at 1148; *Jones*, 299 Md. at 263-70, 473 A.2d at 432-35.
68. Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951).
69. *See id.* at 435-41, 79 A.2d at 557-61.
70. *Id.* at 419-25, 79 A.2d at 550-53.
71. *Id.* at 425-36, 79 A.2d at 553-58.
72. *See id.* at 436-37, 79 A.2d at 559.
73. *See id.* at 437, 79 A.2d at 559.
74. *See Damasiewicz*, 197 Md. at 440, 79 A.2d at 560.
75. *Id.* at 441, 79 A.2d at 561.
76. *See id.*

of a negligently performed sterilization procedure.[77] In so holding, the court surveyed existing precedent in jurisdictions representing both the majority[78] and minority[79] positions relative to the issue of "whether the cause of action encompasses damages for the costs of rearing the unplanned but healthy child to majority."[80] Thereafter, the court examined applicable medical malpractice tort principles in Maryland and the attendant policy considerations,[81] before adopting the minority position,[82] allowing parents to recover damages for child rearing costs through the age of majority, offset by the benefit derived from the child's aid, society and comfort.[83]

3. Wrongful Birth

Building on the principles used in *Jones,* the Court of Appeals of Maryland recognized a parent's cause of action for wrongful birth in *Reed v. Campagnolo.*[84] As in *Jones,* the court analyzed each element of the tort framework, reasoning from the jurisdiction's common law and applicable statutes.[85] In considering the existence of a legal injury, the court relied upon precedent from prevailing jurisdictions, bearing out competing policy arguments.[86] Furthermore, the court's

77. *Jones,* 299 Md. at 263, 473 A.2d at 432. Mr. and Mrs. Malinowski had three children, one by breech birth, the second born with a brain disease, and the third born with a heart disease. *Id.* at 260, 473 A.2d at 430. Motivated by financial difficulties and the trauma the couple experienced with childbirth, Mrs. Malinowski underwent a sterilization procedure called bipolar tubal laparoscopy. *Id.* During the procedure, the physician cauterized the wrong tissue, failing to block one of the Fallopian tubes. *Id.* Thus, the procedure was ineffective. *Id.* Mrs. Malinowski became pregnant a fourth time, delivering a healthy child. *Id.*

78. *Id.* at 263-65, 473 A.2d at 432-33.

79. *Id.* at 265-68, 473 A.2d at 433-34.

80. *Id.* at 263, 473 A.2d at 432.

81. *Id.* at 268-71, 473 A.2d at 435-36.

82. *Id.* at 270, 473 A.2d at 435.

83. *Jones,* 299 Md. at 270, 473 A.2d at 435. See *id.* at 272-74, 473 A.2d at 436-37, for a discussion of the assessment of damages for child rearing costs offset by the benefits rule.

84. 332 Md. 226, 240, 630 A.2d 1145, 1152 (1993). The Reeds were not informed by their medical provider of the "existence or need for routine [alpha-fetoprotein] ("AFP") testing" as a part of prenatal care. *Id.* at 229, 630 A.2d at 1146. The Reeds' child was born with spina bifida and other genetic abnormalities, which an AFP test would have detected. *Id.* at 229-30, 630 A.2d at 1146-47. Consequently, the Reeds were stripped of their ability to choose to terminate the pregnancy. *Id.*

85. *Id.* at 232-40, 630 A.2d at 1148-52.

86. *Id.* at 235-39, 630 A.2d at 1149-51. When the court decided the issue of whether to recognize a cause of action for wrongful birth, the prevailing arguments concerning the existence of a legal injury considered the economic impact of delivering and raising a child, healthy or not, on one side, against the notion that life, under any circumstance, cannot be considered a legal injury, on the other side. *Id.*

broad view of proximate cause contributed to the validity of wrongful birth claims in Maryland.[87]

D. Arguments Supported by the Statutory Scheme in Maryland

The statutory scheme and supporting common law in Maryland provide a basis for recognizing wrongful life as a valid cause of action.[88] Section 20-209 of the Health-General Article of the Maryland Code codifies Maryland's abortion law, a liberal statute[89] that does not provide a time limitation for terminating a pregnancy if the fetus suffers from a "genetic defect or serious deformity or abnormality."[90] Also relevant to the validity of wrongful life is the statutory obligation imposed on the parents of destitute adult children to provide "food, shelter, care and clothing,"[91] an obligation enforceable by criminal sanctions.[92] Beyond these statutory obligations, however, the common law does not extend primary responsibility for the adult child's medical expenses to the parent.[93]

87. *Id.* at 239-40, 630 A.2d 1151-52. The court relied upon a substantial factor analysis of legal cause. *See id.* at 240, 630 A.2d at 1152; *see also Kassama*, 136 Md. App. at 658-63, 767 A.2d at 359-62 (discussing the issue of proximate cause).

88. *See infra* notes 90-104, 153-54 and accompanying text; *see also infra* Part IV. A-B.

89. *Kassama*, 136 Md. App. at 646, 767 A.2d at 353.

90. MD. CODE ANN., HEALTH-GEN. § 20-209(b)(2)(ii) (2001). The pertinent language reads:

> (b) State intervention.—Except as otherwise provided in this subtitle, the State may not interfere with the decision of a woman to terminate a pregnancy:
> (1) Before the fetus is viable; or
> (2) At any time during the woman's pregnancy, if:
> (i) The termination procedure is necessary to protect the life or health of the woman; or
> (ii) The fetus is affected by genetic defect or serious deformity or abnormality.

Id.

91. MD. CODE ANN., FAM. LAW § 13-102(b) (1999). The statute reads:

> (b) *Duty to support destitute adult child.*—If a destitute adult child is in this State and has a parent who has or is able to earn sufficient means, the parent may not neglect or refuse to provide the destitute adult child with food, shelter, care, and clothing.

Id.

92. MD. CODE ANN., FAM. LAW § 13-102(c) (1999 & Supp. 2002). The statute reads:

> (c) *Penalties.*—A person who violates any provision of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $1,000 or imprisonment not exceeding 1 year, or both.

Id.

93. *See* Pepper v. Johns Hopkins Hosp., 111 Md. App. 49, 70-71, 680 A.2d 532, 542-43 (1996), *aff'd*, 346 Md. 679, 697 A.2d 1358 (1997) (stating that "parents do not. . . have the *primary* responsibility for post-majority medical expenses of their children . . . . Section 13-102(b) of the Family Law Article

Significant to the argument in favor of recognizing wrongful life is the judicial interpretation of Section 13-102(b) of the Family Law Article in *Pepper v. Johns Hopkins Hospital*.[94] Pepper involved a medical malpractice claim brought by a minor patient seeking, among other things, to recover post-majority damages from a negligent medical care provider.[95] Reasoning from their decision in *Presley v. Presley*[96] and their interpretation of Section 13-102(b),[97] the Court of Special Appeals of Maryland noted that parents are not "primarily liable for the medical expenses of an adult child."[98] The court's rationale relied upon the ability of the tort system to vindicate the otherwise illogical result that holds the potential to bankrupt a family due to their statutorily imposed responsibility for the expenses incurred by the incapacitated adult child due to "the negligence of a solvent third party."[99] Furthermore, section 13-102(b) does not give rise to a cause of action in favor of the parent against the negligent doctor.[100] Thus, the rule

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places upon an adult child's parents a contingent responsibility for the adult child's medical expenses if the adult child is destitute and cannot pay them"). For a comprehensive history of the common law enforcement of Section 13-102(b) of the Family Law Article, see *Freeburger v. Bichell*, 135 Md. App. 680, 763 A.2d 1226 (2000) (concluding that the parent of an injured adult child did not establish that he was under a legal obligation to provide for his son's medical care).

94. 111 Md. App. at 70-72, 680 A.2d 542-43.

95. *See id.* at 56-60, 680 A.2d at 535-37. For a specific discussion regarding the claim for post-majority medical expenses, see *id.* at 70-73, 650 A.2d at 542-44.

96. 65 Md. App. 265, 277-78, 500 A.2d 322, 328 (1985) ("The duty of support arises when the child has insufficient resources and, because of mental or physical infirmity, insufficient income capacity to enable him to meet his *reasonable* living expenses.").

97. *See supra* note 91 and accompanying text.

98. *Pepper*, 111 Md. App. at 71-72, 680 A.2d at 543. The court noted that "[a]n adult child is primarily liable for his or her own medical expenses." *Id.* at 70, 680 A.2d at 542. In the case of a destitute adult child, however, Section 13-102(b) of the Family Law Article requires an adult child's parents to pay medical expenses if the adult is unable to pay. *Id.* at 71, 680 A.2d at 543.

99. *Id.* at 71-72, 680 A.2d at 543. The court stated:

> Furthermore, the contingent responsibility would not normally be expected to come into play if injury is caused by the negligence of a solvent third party and if the tort system works as it should. Tort recovery is designed, *inter alia*, to prevent an injured party from becoming destitute and a burden upon innocent third parties.

Id. at 71, 680 A.2d at 543; *see also* Hale v. State, 44 Md. App. 376, 378-79, 408 A.2d 772, 772-73 (1979) (holding that an adult child is liable under Article 27, section 104 only if it is proven beyond a reasonable doubt that the parent was destitute, and that the adult child was "able to earn means sufficient" to support the parent); *see also* Sininger v. Sininger, 300 Md. 604, 611, 479 A.2d 1354, 1358 (1984) (holding that a parent with the means to do so, must support a destitute adult child whose disability commenced after the age of majority).

100. Freeburger v. Bichell, 135 Md. App. 680, 682-83, 763 A.2d 1226, 1227 (2000) (involving a suit brought by the father of a destitute, disabled, adult child against the tortfeasor responsible for the adult child's injuries).

of *Pepper* clearly supports a cause of action that would enable a plaintiff child to recover for the extraordinary cost of medical care attendant with the injury suffered at the hands of a negligent medical provider.[101] Reading Maryland's abortion law[102] in conjunction with section 13-102(b) and the supporting case law,[103] a theory that would enable a plaintiff child to recover post-majority damages to compensate for the extraordinary expense of medical care and maintenance concomitant with her existence, a condition proximately caused by the negligence of the medical provider,[104] becomes reasonable.

III. *KASSAMA v. MAGAT*: BACKGROUND FACTS AND LEGAL DOCTRINE

A. *The Facts of* Kassama v. Magat

As a matter of first impression,[105] the Court of Special Appeals of Maryland addressed a wrongful life claim brought by Milicent Kassama ("Mrs. Kassama") on behalf of her daughter, Ibrion.[106] At the same time, Mrs. Kassama brought her own claim for wrongful birth.[107] Both causes of action were based on negligence and lack of informed consent.[108]

The facts giving rise to the litigation remained unsettled at trial, as Mrs. Kassama and Dr. Magat disagreed as to the timing of critical events.[109] According to Dr. Magat, Mrs. Kassama's obstetrician-gynecologist, Mrs. Kassama's initial appointment was April 19, 1995, at which time an ultrasound test was performed revealing the age of her fetus as seventeen weeks, four days.[110] As such, Mrs. Kassama was noted in the file as a "late registrant."[111] During the initial visit, Dr. Magat "ordered blood work, including an AFP test."[112] Mrs. Kassama was given a requisition slip and referred to a laboratory not far from

101. *Pepper*, 111 Md. App. at 71, 680 A.2d at 543.
102. *Supra* note 90.
103. *See supra* notes 91, 93-100 and accompanying text.
104. In wrongful life claims, the injury complained of is life itself. *See supra* notes 5-7, 46-48 and accompanying text.
105. *Kassama*, 136 Md. App. at 641, 767 A.2d at 350.
106. *Id.* at 643, 767 A.2d at 351.
107. *See id.*
108. *Id.* at 642-43, 767 A.2d at 351.
109. *See id.* at 646-52, 767 A.2d at 353-56.
110. *Id.* at 646-47, 767 A.2d at 353.
111. *Kassama*, 136 Md. App. at 647, 767 A.2d at 353.
112. *Id.* at 646-47, 767 A.2d at 353. Alpha-fetoprotein "increases in maternal blood during pregnancy and, when detected by amniocentesis, is an important indicator of open neural tube defects. . . ." STEDMAN'S MEDICAL DICTIONARY 637 (26th ed. 1995). An AFP test is a method of detecting the potential for genetic defects in a fetus. *Kassama*, 136 Md. App. at 644, 767 A.2d at 352. The test involves drawing and analyzing blood drawn from the mother, generally fifteen to sixteen weeks into her pregnancy but as late as nineteen weeks, to determine the level of alpha fetoprotein present. *Id.* Unusually low scores are indicative of Down's syndrome. *Id.*

the doctor's office where a blood sample would be drawn and analyzed.[113] Dr. Magat explained the purpose of the AFP test, when the test should be performed, and discussed screenings for other potential maladies.[114] Dr. Magat told her to have the tests performed "as soon as possible" and dated the requisition slip April 20, 1995, as he expected the tests to be performed the next day.[115] Mrs. Kassama was given two additional slips, one of which was to be used for an official ultrasound.[116]

Mrs. Kassama's next visit with Dr. Magat was May 18, 1995.[117] During the appointment, she told the doctor that the blood for the AFP test was drawn May 16, 1995, prompting Dr. Magat to note on her chart that the patient was "non-compliant."[118] The lab results were summarized in a report, which Dr. Magat reviewed on May 25, 1995.[119] According to Dr. Magat, he then informed Mrs. Kassama by phone that the test results indicated that she "had a one in fifty-seven chance of delivering a baby with Down's syndrome."[120] At the time of Dr. Magat's call, the gestational age of the fetus was twenty-two weeks, four days.[121]

Evidence at trial established that no doctor in Maryland would perform an abortion of a fetus with Down's syndrome beyond twenty-three weeks, six days.[122] However, because AFP tests are not definitive, amniocentesis was needed.[123] Dr. Magat testified that during a phone conversation on May 25th, he told Mrs. Kassama that by the

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113. *Id.* at 647, 767 A.2d at 353.
114. *Id.* at 647, 767 A.2d at 354.
115. *Id.* at 647, 767 A.2d at 353.
116. *Kassama*, 136 Md. App. at 647, 767 A.2d at 353-54.
117. *Id.* at 647, 767 A.2d at 354.
118. *Id.* at 647-48, 767 A.2d at 354.
119. *Id.* at 648, 767 A.2d at 354.
120. *Id.* at 648-49, 767 A.2d at 354. Down's syndrome is defined as:

> [A] chromosomal dysgenesis syndrome consisting of a variable constellation of abnormalities caused by triplication or translocation of chromosome 21. The abnormalities include mental retardation, retarded growth, flat hypoplastic face with short nose, prominent epicanthic skin folds, small low-set ears with prominent antihelix, fissured and thickened tongue, laxness of joint ligaments, pelvic dysplasia, broad hands and feet, stubby fingers, and transverse palmar crease. Lenticular opacities and heart disease are common. The incidence of leukemia is increased and Alzheimer's disease is almost inevitable by age 40.

STEDMAN'S MEDICAL DICTIONARY 1728 (26th ed. 1995).

121. *Kassama*, 136 Md. App. at 648, 767 A.2d at 354.
122. *Id.*
123. *Id.* at 644-45, 767 A.2d at 352. Amniocentesis is defined as "[t]ransabdominal aspiration of fluid from the amniotic sac." STEDMAN'S MEDICAL DICTIONARY 62 (26th ed. 1995). Amniocentesis is a test conducted to determine, with certainty, the genetic profile of a fetus. *Kassama*, 136 Md. App. at 644-45, 767 A.2d at 352. The test is usually performed subsequent to an AFP test that indicates an increased likelihood of genetic defects in the fetus. *Id.* Test results enable parents to adequately plan for or

time an amniocentesis could have been performed, and the results obtained, there would be insufficient time to schedule and perform an abortion in Maryland.[124] Dr. Magat also testified that he informed Mrs. Kassama of her option to obtain an abortion in other states.[125]

Contrary to Dr. Magat's testimony, Mrs. Kassama testified that she followed Dr. Magat's directions, undergoing an ultrasound on May 11, 1995, and having blood drawn May 16, 1995.[126] Furthermore, Mrs. Kassama testified that the phone conversation on May 25th never happened, and that she was not informed of the AFP test results, the option of performing an amniocentesis, or an abortion.[127] Mrs. Kassama further testified that had she been properly informed, she would have obtained an amniocentesis, and if she had been certain that her fetus had Down's syndrome, she would have obtained an abortion in Maryland or elsewhere.[128] Ibrion was born September 19, 1995, afflicted with Down's syndrome.[129] Mrs. Kassama then filed suit in the Circuit Court for Baltimore County against Dr. Magat.[130]

B. Issues Presented by Kassama

Prior to trial, the defendant was granted partial summary judgment as to Ibrion Kassama's claim of lack of informed consent.[131] At the close of the plaintiff's case, the defendant's motion for judgment was granted as to Ibrion's claim of negligence and Mrs. Kassama's claim of lack of informed consent, leaving only the mother's wrongful birth claim for the jury.[132] The jury determined that Dr. Magat had breached the standard of care, and was, therefore, the proximate cause of Mrs. Kassama's injury.[133] The jury also determined, however, that Mrs. Kassama was also negligent for her injury,[134] and as such, Mrs. Kassama's claim failed because Maryland courts bar recovery when contributory negligence is present.[135]

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prevent the birth of a genetically defective child. *Id.* at 645, 767 A.2d at 357.

124. *See id.* at 649, 767 A.2d at 354-55.

125. *Id.* Women can get an abortion in New York up to twenty-six weeks of gestational age and, for a Down's syndrome fetus, up to twenty-eight weeks in Kansas. *Id.* at 650, 767 A.2d at 355. Testimony indicated Arkansas as an out-of-state alternative, as well. *See* Kassama v. Magat, 368 Md. 113, 120, 792 A.2d 1102, 1106 (2002).

126. *Kassama,* 136 Md. App. at 647-48, 652, 767 A.2d at 354, 356.

127. *Id.* at 652, 767 A.2d at 356.

128. *Id.*

129. *Id.* at 642, 767 A.2d at 351.

130. *Id.*

131. *Id.* at 643, 767 A.2d at 351.

132. *Kassama,* 136 Md. App. at 643, 767 A.2d at 351.

133. *Id.*

134. *Id.*

135. *See id.* at 657, 767 A.2d at 359 (quoting Batten v. Michel, 15 Md. App. 646, 652, 292 A.2d 707, 711 (1972)); *see also* Bd. of County Comm'rs of Garret

On appeal, Mrs. Kassama raised several issues with respect to her and Ibrion's claims.[136] The Court of Special Appeals of Maryland addressed three of those issues: whether or not the trial court committed error by allowing the jury to decide the issue of Mrs. Kassama's contributory negligence; if not, whether the trial court committed error by not instructing the jury as to the last clear chance doctrine; and whether the trial court erred in granting the defendant's motion for judgment as to the plaintiff's wrongful life claim.[137] The trial court was affirmed on all three issues.[138] Not persuaded by the minority position,[139] the appellate court did not recognize the wrongful life claim due to the impossibility of calculating damages.[140]

C. *Relevant Maryland Precedent*

Due to the novelty of the wrongful life cause of action, the Court of Special Appeals of Maryland, when deciding *Kassama,* relied heavily on persuasive primary authority and secondary sources.[141] However, except for an introductory reference to the jurisdiction's recognition of wrongful birth claims in *Reed v. Campagnolo,* the court did not consider any Maryland cases in the disposition of the wrongful life issue.[142] Furthermore, the court's sole statutory consideration focused on Maryland's abortion law.[143]

County Md. v. Bell Atlantic-Md., Inc., 346 Md. 160, 180, 695 A.2d 171, 181 (1997) (discussing the doctrine of contributory negligence).

136. *Kassama,* 136 Md. App. at 643, 767 A.2d at 351-52.

137. *Id.* at 643-44, 767 A.2d at 351-52. The court did not address three of the questions presented by appellant. *See id.* The declined questions were:
    1. Did the trial court err in excluding any evidence as to post-majority damages?
    2. Did the trial court err in instructing the jury that any damages suffered by Mrs. Kassama were to be offset by any non-economic benefit she suffered as a result of the birth of her daughter?
    3. Did the trial court err in allowing evidence of the availability of public services in contravention of the collateral source rule?

    Id. at 643, 767 A.2d at 352 n.5.

138. *Id.* at 644, 767 A.2d at 352.

139. *See supra* Part II.B.2.

140. *Kassama,* 136 Md. App. at 675, 767 A.2d at 369.

141. *See id.* at 665-75, 767 A.2d at 363-69. The court began its analysis of the wrongful life cause of action by providing an overview of traditional tort law drawn from relevant scholarly writings. *Id.* at 665-66, 767 A.2d at 363-64. The court then continued with an examination of the wrongful life cause of action within the tort framework as demonstrated through precedent-setting cases from foreign jurisdictions. *Id.* at 666-68, 767 A.2d at 364-65. A comprehensive survey of those jurisdictions that have addressed wrongful life, including the majority and minority jurisdictions as well as those states that have legislated to prohibit the cause of action, followed. *Id.* at 668-75, 767 A.2d at 365-69.

142. *Id.* at 665, 767 A.2d at 363.

143. *Id.* at 646, 767 A.2d at 353; *see supra* note 90 and accompanying text.

The court reviewed the prevailing rationale that disqualifies wrongful life claims premised on the absence of a legal injury,[144] and the impossibility of calculating damages,[145] as well as arguments premised on public policy considerations.[146] The court dismissed as flawed, the minority position that limits recovery under wrongful life claims to special damages.[147] Instead, the court, in a footnote, suggested that a parent, through a wrongful birth cause of action, more properly will recover damages under wrongful life, and if not, the state should support the minor.[148] Yet, this suggestion runs counter to the statutory scheme advanced in *Presley v. Presley*[149] and *Pepper v. Johns Hopkins Hospital,*[150] a line of reasoning that was not discussed by the *Kassama* court.[151]

D. Tort Principles as Applied to Medical Malpractice Claims in Maryland

Ultimately, recognition of prenatal torts relies on the satisfaction of the elements of the traditional tort framework as applied to medical malpractice claims in Maryland.[152] Consistency in the analysis of medical malpractice claims is crucial to the strength and validity of the court's holding.[153] A review of *Reed v. Campagnolo* indicates that the

144. *Id.* at 666-67, 767 A.2d at 364. The court discussed Ellis v Sherman, 515 A.2d 1327 (Pa. 1986), in which a wrongful life claim was rejected due to the inability of the plaintiff to prove an injury. *Kassama,* 136 Md. App. at 666, 767 A.2d at 364. The *Ellis* court noted, "the condition was caused not by another, but by natural processes. It is not, therefore a legal injury." *Id.* at 667, 767 A.2d at 364 (quoting *Ellis,* 515 A.2d at 1329).

145. *Id.* at 667, 767 A.2d at 364. The court agreed with the reasoning of *Becker v. Schwartz,* 386 N.E.2d 807 (N.Y. 1978), that a comparison between an impaired life and nonexistence places the calculation of damages outside the ability of the judiciary, thereby frustrating tort principles designed to "put the victim . . . in the position that he would have been in if the defendant had not been negligent." *Kassama,* 136 Md. App. at 667-68, 767 A.2d at 364-65.

146. *Kassama,* 136 Md. App. at 669, 767 A.2d at 365. The court noted certain jurisdictions that reject the wrongful life cause of action due to the "preciousness of human life." *Id.*

147. *Id.* at 672-73, 767 A.2d at 367. The court was unimpressed by the inability of California, Washington and New Jersey to explain the process that denies general damages yet allows special damages. *Id.* at 675, 767 A.2d at 369.

148. *Id.* at 673 n.19, 767 A.2d at 368 n.19.

149. 65 Md. App. 265, 500 A.2d 322 (1985); *see supra* note 96 and accompanying text.

150. 111 Md. App. 49, 680 A.2d 532 (1996); *see supra* notes 94-100 and accompanying text.

151. *See generally Kassama,* 136 Md. App. at 637, 767 A.2d at 348.

152. *Id.* at 673, 767 A.2d at 367-68; *see also* Weimer v. Hetrick, 309 Md. 536, 546-49, 525 A.2d 643, 648-50 (1987); Johns Hopkins Hosp. v. Genda, 255 Md. 616, 621-22, 258 A.2d 595, 598 (1969).

153. *See Kassama,* 136 Md. App. at 672-73, 767 A.2d at 367. In analyzing the validity of the wrongful life cause of action under the tort framework, the Court of Special Appeals of Maryland preyed on the failure of the *Turpin* court to "account fully and consistently for the fundamental flaw of the

Maryland court of appeals' analysis of the wrongful life cause of action may conform to the application of medical malpractice tort principles used when that court confronted wrongful conception and wrongful birth claims.[154]

Maryland's medical malpractice tort law supports a comprehensive standard of care, which describes the duty a physician owes to a patient.[155] As developed through the common law, the duty of a physician to a patient also extends to the unborn child.[156] As applied to the facts at issue in *Kassama,* and in accordance with the defendant's own testimony, if the trier of fact believed Mrs. Kassama's version of events—that she was not informed of the results of the AFP test or of her options to terminate the pregnancy—the defendant would have breached the duty of care.[157]

Following a breach of the duty of care, the plaintiff must then establish that such a breach caused, or proximately caused, the injury suffered.[158] Maryland views this element broadly, employing the "substantial factor" test to determine causation.[159] When viewed from the plaintiff child's position in a wrongful life claim, arguments purporting to establish causation, injury and damages are tenuous.[160] The "substantial factor" analysis, however, enables the court to satisfy causation by recognizing the ability of the physician to circumvent liability through proper execution of the physician's duty.[161]

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wrongful life claim—the inability to make the required comparison between the plaintiff's actual condition and nonexistence." *Id.* (quoting Kurtis J. Kearl, *Turpin v. Sortini: Recognizing the Unsupportable Cause of Action for Wrongful Life,* 71 CAL. L. REV. 1278 (1983)).

154. Reed v. Campagnolo, 332 Md. 226, 232, 630 A.2d 1145, 1148 (1993). The Court of Appeals of Maryland demonstrates the need for consistency by adhering to the same tort principles applied in *Jones v. Malinowski,* when deciding whether or not to recognize wrongful birth claims in *Reed v. Campagnolo. Id.*

155. As described by the court in *Reed:*

> A physician is under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances. Under this standard, advances in the profession, availability of facilities, specialization or general practice, proximity of specialists and special facilities, together with all other relevant considerations, are to be taken into account.

Reed, 332 Md. at 233, 630 A.2d at 1148 (quoting Shilkret v. Annapolis Emergency Hosp., 276 Md. 187, 200-01, 349 A.2d 245, 253 (1975)).

156. *Reed,* 332 Md. at 233, 630 A.2d at 1148 (quoting Suburban Hosp. Ass'n v. Mewhinney, 230 Md. 480, 484-85, 187 A.2d 671, 673 (1963)).

157. *Kassama,* 136 Md. App. at 650, 767 A.2d at 355.

158. *Reed,* 332 Md. at 232-33, 630 A.2d at 1148.

159. *Id.* at 240, 630 A.2d at 1152. Negligent conduct is the legal cause of injury if it is a "substantial factor" and the actor is not relieved from liability by rule of law. RESTATEMENT (SECOND) OF TORTS § 431 (1965).

160. *See supra* Part II.B.2.

161. *See Reed,* 332 Md. at 241, 630 A.2d at 1152 (quoting Sard v. Hardy, 281 Md. 432, 438-39, 379 A.2d, 1014, 1019 (1977) for the proposition that "the doc-

Turning to the determination of damages, Maryland common law recognizes, as a general rule, that "a plaintiff may recover only those damages that are affirmatively proved with reasonable certainty to have resulted as the natural, proximate and direct effect of the tortious misconduct."[162] Maryland employs two principles, the doctrine of avoidable consequences[163] and the benefit-offset rule,[164] in the determination of recoverable damages.[165] As a matter of public policy and logic, the former is unlikely to bear on the calculation of damages in the context of a wrongful life claim.[166] Yet, as demonstrated by certain jurisdictions adopting the majority position, special benefits conferred upon the plaintiff by the defendant's negligent conduct, namely the preciousness of life, may be considered in offsetting, or more to the extreme, nullifying, recoverable damages.[167]

Furthermore, the purpose underlying the tort system of recovery is the notion that damages should be designed with the intention of restoring the injured party to the condition they would experience, but for the negligence of the tortfeasor.[168] Falling in line with the majority of jurisdictions that have addressed wrongful life claims, the Court

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trine of informed consent imposes on a physician . . . the duty to explain the procedure to the patient and to warn him of any material risks or dangers inherent in or collateral to the therapy, so as to enable the patient to make an intelligent and informed choice.").

162. Jones v. Malinowski, 299 Md. 257, 269, 473 A.2d 429, 435 (1984).

163. The *Restatement (Second) of Torts* section 918 explains the doctrine of avoidable consequences as follows:

> (1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.
>
> (2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

RESTATEMENT (SECOND) OF TORTS § 918 (1965).

164. The *Restatement (Second) of Torts* section 920 explains the benefit offset rule as follows:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

RESTATEMENT (SECOND) OF TORTS § 920 (1965).

165. *Jones*, 299 Md. at 269, 473 A.2d at 435.

166. *See id.* at 274, 473 A.2d at 437-38 (denying Dr. Jones' contentions that under the doctrine of avoidable consequences Mrs. Malinowski refusal to submit to an abortion, or place her daughter up for adoption should be considered when mitigating damages).

167. *See, e.g.*, Viccaro v. Milunsky, 551 N.E.2d 8, 11-12 (Mass. 1990); *see also supra* note 144 and accompanying text.

168. Kush v. Lloyd, 616 So. 2d 415, 424 (Fla. 1993); *Smith*, 513 A.2d at 348; *Nelson*, 678 S.W.2d at 924-25.

of Special Appeals of Maryland found the calculation of damages impossible and thus fatal to the plaintiff's claim, as the comparison model, weighing nonexistence versus life in an impaired state, does not provide a standard for quantifying the value of the injury.[169]

E. How the Court of Appeals of Maryland Decided the Matter

The Court of Appeals of Maryland affirmed the judgment of the lower court, yet determined the matter on the premise that life does not constitute a legal injury.[170] The court's discussion of wrongful life, including wrongful conception and wrongful birth, begins by classifying the tort action at issue, reviewing related causes of action, and examining the Maryland case law that supports them.[171] Building a foundation for the holding, the court of appeals drew attention to the narrow language of *Jones*, which described the injury to the parents of a healthy child as the costs attendant with raising a child, not the child itself.[172] Further, the court distinguished the instant case from *Reed*, noting that in wrongful birth claims parents claim injuries of emotional distress and child-raising expenses resulting from a medical provider's negligence;[173] whereas, in this matter the defendant did not cause plaintiff's injury.[174]

Continuing to frame its rationale, the court of appeals looked to two of the broad bases that sister jurisdictions have endorsed to invalidate wrongful life claims: 1) that the damage calculation is too complex; and 2) that the philosophical imponderable tied to the determination of whether an injury exists allows for varied results when left to the fact finder for resolution.[175] Further exploring these considerations, the court outlined the inadequacy of a damage rubric that purports to restore plaintiffs to the condition they would have experienced but for the claimed negligence when confronted with a

169. *Kassama*, 136 Md. App. at 675, 767 A.2d at 369.

170. Kassama v. Magat, 368 Md. 113, 149, 792 A.2d 1102, 1123-24 (2002); *cf.* Kassama v. Magat, 136 Md. App. 637, 675, 767 A.2d 348, 369 (2001) (invalidating a claim for wrongful life because of an inability to calculate damages).

171. *Kassama*, 368 Md. at 134-37, 792 A.2d at 1114-16. The Maryland cases considered by the court in determining the wrongful life claim included *Reed v. Campagnolo*, 332 Md. 226, 630 A.2d 1145 (1993) (validating a cause of action for wrongful birth); *Jones v. Malinowski*, 299 Md. 257, 473 A.2d 429 (1984) (recognizing claim for wrongful conception based on negligent sterilization procedure); and *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951) (vesting a postnatal claim in both the child and parent for the negligent infliction of prenatal injuries).

172. *Kassama*, 368 Md. at 136, 792 A.2d at 1116; *see also* Jones v. Malinowski, 299 Md. 257, 270, 473 A.2d 429, 435-36 (1984).

173. *Kassama*, 368 Md. at 137, 792 A.2d at 1116.

174. *Id.*

175. *Id.* at 138, 792 A.2d at 1117.

comparison between life and nonexistence.[176] More critical still, the court of appeals emphasized the inability of many jurisdictions to find a common law or statutory basis to recognize life as an injury.[177]

Of those states that have addressed the wrongful life issue through case law, two states' opinions figured prominently in Maryland's determination of the matter.[178] The Court of Appeals of Maryland pointed out Arizona's holding in *Walker by Pizano v. Mart*,[179] which invalidated wrongful life from a fetal rights perspective, and New Hampshire's holding in *Smith v. Cote*,[180] which discussed the public policy arguments against recognizing wrongful life.[181] The Supreme Court of Arizona reasoned that while the physician's duty of care extended to the fetus, the fetus did not have a right to be born or the ability to determine matters related to birth.[182] As such, "any wrong . . . [committed is] a wrong to the parents, not the fetus."[183]

The Court of Appeals of Maryland also noted New Hampshire's elucidation of several public policy arguments against recognizing wrongful life in *Smith v. Cote*.[184] In that case, the Supreme Court of New Hampshire considered whether the judiciary was competent to decide the value of life, determining that courts should not get involved in deciding the worth of a person's life.[185] Further, the court feared validating wrongful life claims would: "disparage the dignity of the disabled," and that the "subjective and intensely personal notions as to the intangible value of life" considered by juries would create disparate outcomes.[186]

Turning to the minority states—California, Washington and New Jersey—the Court of Appeals of Maryland scrutinized the reasoning by which these states validated a limited cause of action for wrongful life.[187] The court found the determination of damages significant, to the extent that each of the minority jurisdictions agreed with the majority position that a general damage award was impossible to recognize.[188] This commonality supports Maryland's holding – not to

176. *See id.* at 138-40, 792 A.2d at 1117-18 (recounting the treatment of a wrongful life claim and inability to award damages by the Supreme Court of New Jersey in *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967)).
177. *See Kassama*, 368 Md. at 140, 792 A.2d at 1118.
178. *See id.* at 142-43, 792 A.2d at 1120.
179. 790 P.2d 735 (Ariz. 1990).
180. 513 A.2d 341, 352-54 (N.H. 1986).
181. *See Kassama*, 368 Md. at 142-43, 792 A.2d at 1120.
182. Walker by Pizano v. Mart, 790 P.2d 735, 739-40 (Ariz. 1990).
183. *Id.* at 740. In this context, the injury resulting from the alleged wrong is "the inability of the parents to terminate the pregnancy which, in turn, resulted in the child being born." *Kassama*, 368 Md. at 143, 792 A.2d at 1120.
184. *Kassama*, 368 Md. at 143, 792 A.2d at 1120 (citing *Smith*, 513 A.2d at 352-54).
185. *Smith*, 513 A.2d at 355.
186. *Id.*
187. *Kassama*, 368 Md. at 144-48, 792 A.2d at 1120-23.
188. *Id.* at 148, 792 A.2d at 1123.

recognize wrongful life claims – in as much as the accord unifies all jurisdictions and enables the court to characterize the distinction between the positions as whether legal reasoning or emotion serves as the basis for judgment.[189] The Court of Appeals of Maryland went on to state that injury cannot be predicated on emotion; instead, finding an injury requires a reasoned basis, without which, a determination of damages becomes moot.[190] Thus presented, the court echoed the criticisms[191] of sister jurisdictions such as Arizona[192] and New Hampshire[193] and held that "for the purposes of tort law, an impaired life is *not* worse than non-life, and, for that reason, life is not, and cannot be, an injury."[194]

IV. ANALYSIS

A. Maryland Should Have Recognized the Wrongful Life Cause of Action

The Maryland judiciary, drawing support from the statutory scheme and common law, should have recognized the wrongful life cause of action, at least in limited circumstances. The cause of action arising from the same set of facts, yet owned by the parents,[195] should inure to the child when the parents are not available to sue.[196] Furthermore, recognition of the child's wrongful life claim would alleviate the financial burden the child is faced with in terms of the cost of lifelong medical care and maintenance.

B. Why the Court Should Have Recognized the Wrongful Life Cause of Action

Recognition of the wrongful life cause of action would satisfy the social aims of the tort system, remedy statutory pitfalls, and meet the ever-increasing legal obligations concomitant with advancements in genetic counseling and medical technology. "Tort recovery is designed, *inter alia,* to prevent an injured party from becoming destitute and a burden upon innocent third parties."[197] This policy necessarily

189. *See id.*
190. *See Kassama,* 368 Md. at 148, 792 A.2d at 1123.
191. *See Kassama,* 368 Md. at 144, 792 A.2d at 1120. Arizona, New Hampshire and other states criticized the minority position for permitting the child to recover special damages but not general damages—placing significance on emotional notions of fairness rather than logic. *Id.*
192. The Supreme Court of Arizona invalidated the wrongful life cause of action in *Walker by Pizano v. Mart,* 790 P.2d 735, 741 (Ariz. 1990).
193. The Supreme Court of New Hampshire invalidated wrongful life claims in *Smith v. Cote,* 513 A.2d 341, 355 (N.H. 1986).
194. *Id.* at 148, 792 A.2d at 1123.
195. *See supra* notes 8-10 and accompanying text.
196. *See Tuprin,* 643 P.2d at 965; *Procanik,* 478 A.2d at 762; Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 495 (Wash. 1983).
197. Pepper v. Johns Hopkins Hosp., 111 Md. App. 49, 71, 680 A.2d 532, 543 (1996).

demands solvent tortfeasors share in the financial burden resulting from their negligent conduct.[198] Additionally, as a principle well established in the common law, tort recovery deters negligent conduct.[199]

As demonstrated by the minority jurisdictions, application of the traditional tort framework results in a valid cause of action for wrongful life.[200] Where an injury is identifiable, damages may be awarded in tort to "restore an injured person as nearly as possible to the position he or she would have been in had the wrong not been done."[201] The award of damages should be limited to those that flow proximately from the negligent conduct and are readily ascertainable.[202] Though the award of general damages, encompassing compensation for pain and suffering, is not amenable to rational determination or "fair, nonspeculative" calculation,[203] other types of damages proximately caused by third party negligence—special damages—are not only readily ascertainable, but regularly awarded in professional malpractice cases.[204]

Recognition of wrongful life as a valid cause of action would remedy gaps and pitfalls within the existing statutory scheme.[205] At present, Maryland statutory law obligates parents to provide for destitute adult children.[206] The primary purpose of this obligation is "to remove from public support destitute and disabled people whose relatives are financially able to support them."[207] This responsibility, while an obvi-

198. *See id.*

199. *Procanik*, 478 A.2d at 764; *Harbeson*, 656 P.2d at 496.

200. *See Turpin*, 643 P.2d at 960; *Procanik*, 478 A.2d at 763; *Harbeson*, 656 P.2d at 488.

201. *Turpin*, 643 P.2d at 961.

202. *See id.* at 963-64.

203. *Id.* The court in *Turpin* concedes that the fact finder, being human, is not competent to "determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born." *Id.* at 963. Further, the court acknowledges the impossibility of determining the value of general damages in a "fair, nonspeculative manner." *Id.* Explaining by way of analogy, the court established that the ability to valuate the difference between an infirm life and nonexistence is not parallel to determining the value of a broken arm, as the latter is within the realm of human experience and imagination, and the former is not. *Id.* at 963-64.

204. *Id.* at 965. Special damages represent the cost of the child's "present and continuing need for such special, extraordinary medical care and training . . . ." *Id.*

205. *See supra* Part II.D.

206. MD. CODE ANN., FAM. LAW § 13-102(b) (1999).

207. Freeburger v. Bichell, 135 Md. App. 680, 692, 763 A.2d 1226, 1232 (2000) (holding that section 13-102(b) of the Maryland Family Law Article does not give rise to an independent cause of action in the parent against the tortfeasor who caused the adult child's disability).

ous and rightful promotion of family values, holds the potential to financially ruin a family.[208]

Under *Jones v. Malinowski*,[209] parents may only recover damages up to the age of majority on a claim of wrongful conception.[210] Though the Court of Appeals of Maryland recognized wrongful birth as a valid cause of action in *Reed v. Campagnolo*,[211] the court did not extend recovery beyond the age of majority.[212] Furthermore, only parents may recover for wrongful birth.[213] In addition, the common law rule of *Freeburger* denies a cause of action in tort under section 13-102(b) of the Maryland Family Law Article in favor of the caretaker of a destitute disabled person against a third party tortfeasor.[214] Thus, a further concern assuaged by the recognition of a claim for wrongful life is the need for a parent to be available to bring a wrongful birth cause of action in order to recover damages and defray the costs of ongoing medical care.[215] In this vein, the wrongful life cause of action not only guarantees a mechanism by which the child may allay the extraordinary cost of a lifetime of medical care; the cause of action also protects the child from parents absconding damages recovered from their own wrongful birth claim, or who may breach the fiduciary relationship created therein; or who may simply be unavailable to bring a cause of action for wrongful birth.[216]

Paramount in the discussion of whether or not to recognize a cause of action for wrongful life is proper allocation of the exorbitant cost of living for disabled persons. Currently, the common law only provides for damages to be awarded to the parents.[217] Moreover, these remedies only compensate the injured party until the child obtains the age of majority, leaving the disabled individual without financial support as an adult.[218] In the face of lifetime medical care, this inadequacy exposes the legally obligated family to bankruptcy,[219] a second harm visited upon the family already suffering from the emotional heartache of raising a child with a genetic disorder. A growing uninsured

208. "A 1998 survey conducted by the National Commission on Orphan Diseases revealed that in nearly half of the cases studied, the existence of a hereditary disorder caused the patient or care-giver relative financial hardship, due in part to inadequate medical insurance." David T. Morris, Notes and Comments, *Cost Containment and Reproductive Autonomy: Prenatal Genetic Screening and the American Health Security Act of 1993*, 20 AM. J.L.& MED. 295, 298 (1994).
209. 299 Md. 257, 473 A.2d 429 (1984).
210. *Id.* at 270, 473 A.2d at 435.
211. 332 Md. 226, 630 A.2d 1145 (1993).
212. *See id.* at 238, 630 A.2d at 1151.
213. *See supra* note 9 and accompanying text.
214. *Freeburger*, 135 Md. App. at 682-83, 763 A.2d at 1227.
215. *See Smith*, 513 A.2d at 355.
216. *See Walker by Pizano*, 790 P.2d at 741.
217. *See supra* notes 9, 84-87, 215 and accompanying text.
218. *See supra* notes 212-14 and accompanying text.
219. *See supra* notes 207-10 and accompanying text.

population[220] further compounds the financial burden left by common law remedies. In addition, public assistance health plans that sacrifice much needed medical benefits in the name of politics,[221] are not helpful when "persons affected by genetic disease are often among the class of individuals who . . . are least likely to be able to obtain [medical insurance]."[222] In the event that the parents are unable to provide such care, the child will necessarily become the responsibility of the state.[223]

Yet another reason to recognize the wrongful life cause of action speaks to advancements in genetic counseling and medical technology.[224] Increased knowledge of the human genome holds the potential "to isolate and successfully alter the genetic make-up of embryo cells, thus curing genetic disorders."[225] Such capability will likely cause many jurisdictions in the majority to change position and recognize modified wrongful life claims, as the causal link between the doctor's negligence and the child's impairment will be firmly established.[226] Additionally, jurisdictions rejecting the claim due to the impossibility of calculating damages may likely change position as the impaired life versus non-life comparison will be replaced with a comparison "between life with a genetic disorder and life without a genetic disorder."[227]

At the same time knowledge increases, so too the standard of care owed to patients will increase.[228] Though the same community standard may slow this evolution, the judiciary will not condone class negligence.[229] While many courts acknowledge the potential for scientific advancements to impact the current state of the law, few jurisdictions make more than casual reference to such considerations, and none

220. David T. Morris, Notes and Comments, *Cost Containment and Reproductive Autonomy: Prenatal Genetic Screening and the American Health Security Act of 1993*, 20 AM. J.L. & MED. 295, 298 (1994).
221. The Hyde Amendment, 42 U.S.C.A. section 1396 (West 1992), denies abortion benefits under Medicaid except when the life of the mother is in danger. *See also* Morris, *supra* note 220, at 298.
222. Morris, *supra* note 220, at 298.
223. *See supra* note 148 and accompanying text.
224. *See supra* note 18 and accompanying text.
225. Thomas A. Warnock, *Scientific Advancements: Will Technology Make the Unpopular Wrongful Birth/Life Causes of Action Extinct?*, 19 TEMP. ENVTL. L. & TECH. J. 173, 184 (2001).
226. *Id.; see also supra* note 21.
227. Warnock, *supra* note 225, at 184.
228. *See id.* at 185.
229. *See id.* "If a community of professionals continues to employ outdated practices, the courts reserve the authority to declare the entire group negligent." *Id.*

find such arguments persuasive enough to validate wrongful life claims.[230]

C. *Shortcomings*

The greatest obstacle to recognizing a cause of action for wrongful life lies in the great weight accorded public policy in the resolution of the issue.[231] The weight of public policy is perhaps most forceful in those jurisdictions rejecting wrongful life due to the impossibility of calculating damages; an inability often addressed in metaphysical terms.[232] The essence of the wrongful life claim touches sacrosanct tenets of human existence embodied in the common law as the preciousness of human life.[233] Yet, this policy also bears weakness. The notion that mere existence carries with it an indeterminate benefit is individually inspired. For there is no benefit when one cannot conceive, cannot process, cannot comprehend or cannot act to enjoy one's own existence.[234]

A further weakness expressed by some majority jurisdictions is a readiness to defer decision of the matter to the legislature.[235] Majority jurisdictions ultimately reject wrongful life claims; yet do so as a conservative course of action begging legislative guidance.[236] Adding to the weakness of the majority position, lack of uniform rationale and

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230. *See Elliott*, 361 So. 2d at 548; Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 566 (Ga. 1990) (Benham, J., dissenting); *Greco*, 893 P.2d at 354 (Shearing, J. and Rose, J. concurring and dissenting).

231. *See Siemieniec*, 512 N.E.2d at 697. The court stated in *Siemieniec*:

> Resting on the belief that human life, no matter how burdened, is, as a matter of law, always preferable to nonlife, the courts have been reluctant to find that the infant has suffered a legally cognizable injury by being born with a congenital or genetic impairment as opposed to not being born at all.

Id.

232. The *Becker* court expressed the difficulty of calculating damages as follows:

> Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.

Becker, 386 N.E.2d at 812; *See also* Kush v. Lloyd, 616 So. 2d 415, 423 (Fla. 1992); *Siemieniec*, 512 N.E.2d at 697; Bruggeman v. Schimke, 718 P.2d 635, 641 (Kan. 1986).

233. *See Siemieniec*, 512 N.E.2d at 697; *Bruggeman*, 718 P.2d at 641; s*ee also supra* notes 54-55 and accompanying text.

234. *See Turpin*, 643 P.2d at 963.

235. *See Siemieniec*, 512 N.E.2d at 702; *Cowe*, 575 N.E.2d at 635; *Pitre*, 517 So. 2d at 1025.

236. *Pitre*, 517 So. 2d at 1025. The court stated "[i]n our view, the question is a matter of public policy. While courts routinely attempt to resolve public policy issues, some issues are clearly more appropriate for legislative consideration than judicial treatment." *Id.*

strong dissents keep the wrongful life issue from finding secure footing.[237]

Not the least of the shortcomings involved with the issue of wrongful life are future considerations, namely advancements in medicine, genetic engineering, and related fields that compound the pressure for recognition of the claim.[238] By nature, the judicial system is, in part, reactive; deciding questions of law derived from events in the past. Yet, to an extent, the pace at which the judiciary lags behind scientific advancements can be controlled.[239] "[A]s . . . science presses forward, researchers and the public must be prepared to grapple with the gamut of ethical, legal, societal, scientific, and medical issues."[240] The wrongful life cause of action presents the judiciary with the unique opportunity to meet the legal progeny of medical trends in a timely manner, thus avoiding the pressure of heated debate.[241]

V. CONCLUSION

The wrongful life cause of action remains in the spotlight of judicial debate as, one by one, jurisdictions decide whether or not the claim is valid.[242] Although a significant number of states reject the claim,[243] they do so shackled by public policy and in the face of vehement dissents often revealing a narrowly divided judiciary.[244] Those states representing the minority position validate a limited cause of action.[245] Conceding the difficulty in adequately determining general damages, minority jurisdictions allow recovery only for special damages, stand-

237. The following cases adopting the majority position, invalidating wrongful life claims, include dissenting opinions: *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988); *Atlanta Obstetrics & Gynecology Group v. Abelson*, 398 S.E.2d 557 (Ga. 1990); *Blake v. Cruz*, 698 P.2d 315 (Idaho 1985); *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691 (Ill. 1987); *Wilson v. Kuenzi*, 751 S.W.2d 741 (Mo. 1988); *Greco v. United States*, 893 P.2d 345 (Nev. 1995); *Ellis v. Sherman*, 515 A.2d 1327 (Pa. 1986); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372 (Wis. 1975).

238. *See Nelson*, 678 S.W.2d at 932 (Kilgarlin, J., concurring in part and dissenting in part).

239. *See id.* (stating "[d]espite the rapidly expanding impact of genetic knowledge upon our society, the law has failed to keep pace . . . . [O]nly by assuring a doctor's legal accountability can we guard against an abuse of such power.").

240. Gwen Moulton, *Panel Finds in Utero Gene Therapy Proposal Is Premature*, 91 J. NAT'L CANCER INST. 407 (1999).

241. Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 566 (Ga. 1990) (Benham, J., dissenting) ("If we are to maintain the proper balance between law and medicine, we cannot allow the law to be determined in the laboratory; but we would be derelict in our duty if we failed to take into consideration developments in the laboratory.").

242. *See supra* Part II.B.

243. *See supra* notes 21-22 and accompanying text.

244. *See supra* notes 230, 237, 239 and accompanying text.

245. *See supra* note 54 and accompanying text.

ing on tort principles that recognize the need to defray the extraordinary cost of ongoing medical care and training borne by plaintiffs as a result of the negligence of a solvent tortfeasor.[246]

Maryland's common law and statutory scheme provide for recognition of a limited cause of action for wrongful life.[247] Such a claim would circumvent the dangers inherent in allowing recovery only to parents under a wrongful birth cause of action.[248] Additionally, a wrongful life claim would alleviate the need to separately address a cause of action for post-majority damages, allowing the child to recover damages not claimed by, or awarded to parents, should they bring a wrongful birth claim.[249] Furthermore, wrongful life claims avoid the pitfalls of a statutory scheme that hold the potential to bankrupt already burdened families by obliging them to provide care and financial support to destitute adult children.[250] Such a claim may also provide the financial means necessary to avoid state involvement in the management and care of individuals born into an existence they can neither afford nor escape.[251] Finally, by recognizing a cause of action for wrongful life, courts have an opportunity to stem the tide of legal claims that flow from advances in medicine and genetics.[252]

Though the Court of Appeals of Maryland refused to recognize a child plaintiff's claim for wrongful life, the matter remains unsettled. The court's holding in *Kassama v. Magat*[253] side-steps two crucial issues lying at the heart of the wrongful life debate: How will the child's needs be met when she obtains majority status? And who will meet these needs? At present, this responsibility lies primarily on the parents.[254] Should the parents be unable to adequately provide for their disabled child, however, the state will necessarily become involved.[255] Meanwhile, the tortfeasor, whose proven negligence results in liability only for pre-majority damages,[256] is released from an obligation under tort law to remedy a harm. Contrary to the tort remedy provided by the court's recognition of wrongful birth claims in *Reed v.*

246. *See supra* note 55 and accompanying text.
247. *See supra* Part II.D.
248. *See supra* notes 202-13 and accompanying text.
249. *See supra* notes 101-02, 206-09 and accompanying text. In the alternative, an expansion of the *Reed* holding to allow parents to recover post-majority damages under a claim of wrongful birth would, in part, remedy the child's claim.
250. *See supra* notes 208-10 and accompanying text.
251. *See supra* notes 221-25 and accompanying text.
252. *See supra* notes 226-29 and accompanying text.
253. 368 Md. 113, 792 A.2d 1102 (2002).
254. *See supra* notes 91-94 and accompanying text.
255. *See supra* notes 91-92 and accompanying text.
256. For the purposes of this argument, suppose the parents of a disabled child successfully brought a wrongful birth claim against the mother's Obstetrician/Gynecologist.

Campagnolo,[257] however, the harm does not cease upon attainment of majority status, but rather continues for the life of the child.

Perhaps the solution to this problem calls for an expansion of the existing common law rules taken from *Jones v. Malinowski* and *Reed*, allowing parents to recover post-majority damages.[258] Yet, this too falls short of securing the financial resources needed to care for the now disabled adult in the event that the parents are not able to bring a wrongful birth claim.

Finally, another tack may yield an answer. The court's holding in *Damasiewicz v. Gorsuch*,[259] allowing child plaintiffs to recover damages for prenatal torts, evokes family law arguments that focus on the right of the child to access the court, relative to the rights of the parents.[260] In this vein, however, circuitous logic may prove fatal, leading the judiciary to again confront a child's claim in the face of a mother's right to determine matters of pregnancy and birth.[261]

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257. 332 Md. 226, 630 A.2d 1145 (1993); *see supra* Part II.C.3.
258. *See supra* Part II.C.2-3.
259. 197 Md. 417, 79 A.2d 550 (1951).
260. *See supra* Part II.C.1.
261. *See supra* notes 42-43 and accompanying text.