RIGHT NOT TO BE BORN—NEW JERSEY BECOMES THE THIRD STATE TO RECOGNIZE WRONGFUL LIFE AS A CAUSE OF ACTION

On June 9, 1977, during the first trimester of her pregnancy, Mrs. Rosemarie Procanik consulted Drs. Joseph Cillo, Herbert Langer, and Ernest Greenberg.[1] At that time, Mrs. Procanik reported to Dr. Cillo that she had recently been diagnosed as having contracted measles, but she was unsure whether it was German measles.[2] Because a woman who has contracted German measles during her pregnancy runs an increased risk of giving birth to a child with defects,[3] Dr. Cillo immediately ordered a test for rubella.[4] Although the results of that test indicated a past infection of rubella, Dr. Cillo did not order further tests to ascertain when Mrs. Procanik had been infected.[5] Instead, he incorrectly interpreted those results as indicating that Mrs. Procanik had become immune to German measles during her childhood.[6] Accordingly, he advised her that she need not be

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[1] Procanik v. Cillo, 97 N.J. 339, 343, 478 A.2d 755, 757-58 (1984). The three doctors were "board-certified obstetricians and gynecologists" engaged in group practice. *Id.* Mrs. Procanik had been under their care for the previous year. Brief on Behalf of Plaintiffs-Appellants at 4, Procanik v. Cillo, No. A-5446-80-T1 (N.J. Super. Ct., App. Div. 1983), *aff'd in part and rev'd in part*, 97 N.J. 339, 478 A.2d 755 (1984) [hereinafter cited as Plaintiffs' Brief].

[2] Procanik v. Cillo, 97 N.J. 339, 343, 478 A.2d 755, 758 (1984).

[3] There is no consensus regarding the exact probability of giving birth to a child with defects under these conditions. If rubella, commonly known as German measles, has been contracted within the first trimester of pregnancy, there is at least a 15% chance of defects. However, the probability of birth defects may rise as high as 50% if rubella is contracted within the first month of pregnancy. 4B R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 305.41 (1984).

[4] Procanik v. Cillo, 97 N.J. 339, 343, 478 A.2d 755, 758 (1984). The Rubella Titer Test, which Dr. Cillo ordered, can determine with a high degree of accuracy whether a woman has contracted German measles by demonstrating the presence of an anti-rubella titer in the blood serum. Kass & Shaw, *The Risk of Birth Defects*: Jacobs v. Theimer *and Parents' Right to Know*, 2 AM. J. LAW & MED. 213, 221 (1976-77).

[5] Procanik v. Cillo, 97 N.J. 339, 343, 478 A.2d 755, 758 (1984).

[6] *Id.* Dr. Cillo should have known that " '[t]he presence of antibody denotes an immune response to Rubella viremia that may have been acquired anywhere from a very few weeks to many years earlier.' " Plaintiffs' Brief, *supra* note 1, at 5 (quotation omitted). Thus, the presence of antibody was insufficient in itself as a basis for determining when Mrs. Procanik's immunity had occurred and Dr. Cillo should have ordered further tests.

concerned.[7] Relying on the doctor's assurances, Mrs. Procanik allowed her pregnancy to continue, and on December 26, 1977, she gave birth to a son, Peter.[8] Within a month, Peter was diagnosed as having congenital rubella syndrome, a condition characterized by multiple birth defects.[9]

One year after Peter's birth, Mr. and Mrs. Procanik consulted an attorney, Mr. Harold Sherman, regarding a possible medical malpractice suit.[10] After contacting Mr. Lee Goldsmith of the law firm of Greenstone, Greenstone and Naishuler,[11] Mr. Sherman advised the Procaniks on May 2, 1979, that they did not have a cause of action against the doctors.[12] In giving that advice, Mr. Sherman failed to inform his clients that the New Jersey Supreme Court had granted certification in *Berman v. Allan*,[13] a case that involved a "wrongful birth" claim.[14] Mr. Sherman also failed to inform the Procaniks of the supreme court's subsequent holding in *Berman v. Allan*[15]—that parents may recover damages for the wrongful birth of a child.[16] Relying on the advice of their attorney, the Procaniks did not pursue any legal action against the doctors and, as a result, on January 16, 1980, the statute of limitations ran on their potential claim.[17]

On April 8, 1981, after seeking legal advice from another

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7 Procanik v. Cillo, 97 N.J. 339, 343, 478 A.2d 755, 758 (1984).

8 *Id.* at 343-44, 478 A.2d at 758.

9 *Id.* at 344, 478 A.2d at 758. Peter suffered from eye lesions, heart disease, and hearing defects. *Id.* Such defects are typical of rubella syndrome, which can also result in underdevelopment of the head, inflammation of the brain and spinal cord, and mental retardation. Kass & Shaw, *supra* note 4, at 222.

10 Procanik v. Cillo, 97 N.J. 339, 344-45, 478 A.2d 755, 758 (1984).

11 *Id.* at 345, 478 A.2d at 758. Mr. Sherman consulted Mr. Goldsmith because Goldsmith's firm specialized in medical malpractice. *Id.*

12 *Id.*

13 78 N.J. 325, 395 A.2d 194 (1978). *Berman* was certified on September 5, 1978, almost eight months prior to the time when Mr. Sherman rendered his advice to the Procaniks. *Id.*

14 *See* Procanik v. Cillo, 97 N.J. 339, 345, 478 A.2d 755, 758 (1984). While courts and commentators have not always been consistent in their terminology, the term "wrongful birth" has generally been used to designate a claim brought by parents on their own behalf, alleging that negligent medical advice or treatment failed to disclose a risk of birth defects to their unborn child, thereby depriving them of their option to avoid or terminate the pregnancy. Comment, *"Wrongful Life": The Right Not to Be Born*, 54 TUL. L. REV. 480, 484 (1980). This cause of action was first recognized in New Jersey in Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979).

15 80 N.J. 421, 404 A.2d 8 (1979).

16 *See* Procanik v. Cillo, 97 N.J. 339, 345, 478 A.2d 755, 758 (1984) (citing *Berman*, 80 N.J. at 433-34, 404 A.2d at 14-15).

17 *Id.*; *see* N.J. STAT. ANN. § 2A:14-2 (West 1984) (statute of limitations for personal injuries).

attorney, the Procaniks instituted a suit in the New Jersey Superior Court.[18] In the first count of the complaint, Peter, through his mother and guardian *ad litem*, alleged that Drs. Cillo, Langer, and Greenberg had negligently deprived his parents of their option to terminate the pregnancy.[19] That count further alleged that their negligence resulted in Peter's birth with congenital rubella syndrome.[20] On the basis of this "wrongful life" claim,[21] Peter sought general damages for pain and suffering and for a "diminished childhood."[22] In the second count, the Procaniks sought damages for emotional distress and for the substantial medical costs attributable to their son's birth defects.[23] A legal malpractice claim against the Procaniks' former attorneys was set forth in the third and final count.[24]

The defendant doctors moved for partial summary judgment dismissing the wrongful life claim brought by Peter.[25] The trial court granted the motion on the ground that the claim failed to state a cause of action upon which relief could be granted.[26] In addition, the court held that the parents' claim against the doc-

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18 Procanik v. Cillo, 97 N.J. 339, 344, 478 A.2d 755, 758 (1984).

19 *Id.* at 343, 478 A.2d at 757.

20 *Id.* at 342, 478 A.2d at 757.

21 A wrongful life claim is considered to be the complement of a wrongful birth claim. This terminology has generally been used to designate a claim brought on behalf of a deformed infant in situations where negligent medical advice or treatment has deprived the parents of the option to avoid or terminate the pregnancy. Comment, *supra* note 14, at 483-85. Compare this definition with the definition of wrongful birth set forth at *supra* note 14.

22 *See* Procanik v. Cillo, 97 N.J. 339, 343, 478 A.2d 755, 757 (1984). A diminished childhood claim is based on an assertion that there has been an adverse impact on the child due to the impaired capacity of his parents to cope with his problems. *See id.* at 363, 478 A.2d at 768 (Handler, J., concurring in part and dissenting in part) (indicating that diminished childhood should be an element of compensable damages).

23 *Id.* at 343, 478 A.2d at 757. It is typical for such medical costs to be extensive. Even if a child with birth defects is not institutionalized, there are costs for medication, nursing and supervision, and special therapy and training. With respect to children suffering from rubella syndrome, there may be expenses for surgery for heart defects, cataracts, and other impairments. *See, e.g.*, Robak v. United States, 658 F.2d 471, 473 (7th Cir. 1981) (two operations for cataracts in addition to special therapy and training); Gleitman v. Cosgrove, 49 N.J. 22, 25, 227 A.2d 689, 690 (1967) (several eye operations, as well as special training); Jacobs v. Theimer, 519 S.W.2d 846, 847 (Tex. 1975) (numerous operations for heart defect).

24 Procanik v. Cillo, 97 N.J. 339, 343, 478 A.2d 755, 757 (1984). The legal malpractice claim was asserted against Harold Sherman, Lee Goldsmith, and the law firm of Greenstone, Greenstone and Naishuler. *Id.*

25 *Id.* at 342, 478 A.2d at 757.

26 *Id.*

tors was barred by the two-year statute of limitations.[27] The plaintiffs appealed. While the appeal was pending, Peter moved to amend the first count of the complaint, in order to assert a claim for special damages to cover the extraordinary medical expenses that he would incur as an adult.[28] The appellate division denied the motion to amend without prejudice,[29] and it affirmed the lower court's dismissal of the wrongful life count.[30]

In 1983, the Supreme Court of New Jersey granted certification.[31] The primary issue on appeal was the propriety of the partial summary judgment dismissing the wrongful life claim for general damages; the supreme court felt compelled, however, to consider Peter's additional claim for special damages, even though that claim had not been raised before the trial court and had not been considered by the appellate division.[32] The supreme court also considered whether the parents' claim against the doctors was properly barred by the statute of limitations.[33]

On August 1, 1984, in *Procanik v. Cillo*,[34] the supreme court gave partial recognition to the wrongful life cause of action and held that Peter could recover special damages for the extraordinary medical costs attributable to his affliction.[35] The *Procanik* court, however, refused to allow Peter to recover general damages for emotional distress or for an impaired childhood.[36] In addition, the court affirmed the lower court's determination that

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27 *Id.* at 344, 478 A.2d at 758; *see supra* note 17 (setting forth applicable statute of limitations). In discussing the trial court's rulings, Justice Pollock noted that the parents "knew they had a potential cause of action by January 1978, nearly three years before instituting suit." *Id.* The trial court did not rule, however, on the malpractice claim against the attorneys. *Id.* at 345, 478 A.2d at 758.

28 *Id.* at 344, 478 A.2d at 758. These expenses included not only medical costs, but also expenses for nursing and related health care services. *Id.*

29 *Id.*

30 *Id.* at 342, 478 A.2d at 757.

31 Procanik v. Cillo, 95 N.J. 176, 470 A.2d 403 (1983).

32 Procanik v. Cillo, 97 N.J. 339, 344, 478 A.2d 755, 758 (1984). The court asserted that it was persuaded to consider the child's claim for special damages because of considerations of "fairness, justice, and judicial efficiency." *Id.*

33 *Id.* The parents contended that their claim was derived from that of their son, and therefore should not be barred, because N.J. STAT. ANN. § 2A:14-2.1 (West 1984) tolls the statute of limitations during infancy. *Procanik*, 97 N.J. at 344, 378 A.2d at 758.

34 97 N.J. 339, 478 A.2d 755 (1984).

35 *Id.* at 342-43, 478 A.2d at 757. *Procanik* was a 6-1-1 decision with one member of the court, Justice Schreiber, dissenting from the majority's recognition of the wrongful life action. *See id.* at 369-72, 478 A.2d at 772-73 (Schreiber, J., dissenting in part).

36 *Id.* at 343, 478 A.2d at 757. Another member of the court, Justice Handler,

the Procaniks' claim was barred by the statute of limitations.[37] Finally, in light of its recognition of Peter's right to recover for his extraordinary medical expenses, the court noted that even if the parents' claim had not been barred, they could not recover a second time for those expenses.[38]

In recognizing a wrongful life cause of action in *Procanik*, the New Jersey Supreme Court overruled case law that had existed for nearly two decades. In 1967, the supreme court in *Gleitman v. Cosgrove*[39] first considered a wrongful life claim brought against a physician on behalf of a deformed infant.[40] In support of that claim, the Gleitmans alleged that they might have chosen to terminate the pregnancy had they been properly advised by their doctor of the risk of birth defects to their unborn child.[41] Moreover, the parents brought claims on their own behalf and sought recovery for the emotional anguish that they had suffered and the costs that they had incurred in caring for their child due to his "wrongful birth."[42]

The *Gleitman* court held that the parents had suffered no damages cognizable at law.[43] Furthermore, it stated that, even if such damages were cognizable, a claim for wrongful birth would be precluded by public policy supporting the precious nature of human life.[44] With respect to the infant plaintiff's wrongful life

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argued that general damages should be recoverable in a wrongful life suit. *See id.* at 356-69, 478 A.2d at 764-72 (Handler, J., concurring in part and dissenting in part).

37 *Id.* at 356, 478 A.2d at 764. The court concluded that the parents' suit was not derivative of the infant's claim. It asserted that the parents' right to recover derived from an injury to their own independent rights, rather than from an injury to their child. *Id.* at 356, 478 A.2d at 764. Accordingly, recognition of the infant's claim "[did] not resuscitate the expired independent claim of the parents." *Id.*

38 *Id.*

39 49 N.J. 22, 227 A.2d 689 (1967).

40 *See id.* at 24, 227 A.2d at 690. The *Gleitman* decision has been recognized as "the leading 'wrongful life' case." Comment, *supra* note 14, at 486.

41 *Gleitman*, 49 N.J. at 26, 227 A.2d at 691. The risk was due to Mrs. Gleitman's exposure to German measles during her pregnancy. *Id.*

42 *Id.* at 24, 227 A.2d at 690. Not only must wrongful birth and wrongful life actions be distinguished from each other, but each must be distinguished from "wrongful pregnancy" and "dissatisfied life" actions. A wrongful pregnancy claim may be brought by parents in situations where a healthy, but unwanted baby has been born. A dissatisfied life claim may arise when a healthy child seeks damages for his illegitimate birth. Comment, *supra* note 14, at 483-87.

43 *Gleitman*, 49 N.J. at 31, 227 A.2d at 693. The *Gleitman* court specifically stated that the "intangible, unmeasurable, and complex human benefits" of motherhood and fatherhood made it impossible to measure the damages inuring to the parents of a child born with birth defects. *Id.* at 29, 227 A.2d at 693.

44 *Id.* at 31, 227 A.2d at 693. Policy reasons also prevented an award of damages to the parents on the grounds that a child's right to live took precedence over any

claim, the court was even more emphatic. Writing for the court, Justice Proctor stressed that the conduct of the doctors was not the *cause* of the plaintiff's impairment.[45] Therefore, according to the court, the plaintiff, in asserting a wrongful life cause of action, maintained that but for the doctor's negligence, he would not have sustained birth defects because he would not have been born at all—"In other words . . . his very life [was] 'wrongful.' "[46] The *Gleitman* court concluded that it could not award damages to the deformed infant because to do so would compel the court to "weigh the value of life with impairments against the nonexistence of life itself."[47]

In the years immediately following the *Gleitman* decision, the highest court of only one other jurisdiction considered a case involving claims of wrongful life and wrongful birth.[48] That court also refused to recognize such claims.[49] After the landmark decision of the United States Supreme Court in *Roe v. Wade*,[50] however, wrongful birth and wrongful life claims began to appear with greater frequency.[51] The parents' claim for wrongful birth was first to gain acceptance.[52] Once it was established that a wo-

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right the parents might have not to bear the emotional and financial burdens of raising their child. *Id.*

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

46 *Id.*

47 *Id.* Justice Weintraub, who dissented from the majority with respect to the wrongful birth claim, nevertheless agreed with the majority regarding the claim for wrongful life. In a passage often quoted in subsequent cases, he said that "[u]ltimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so." *Id.* at 63, 227 A.2d at 711 (Weintraub, J., dissenting in part).

48 Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968) (wrongful life claim brought on behalf of child denied; wrongful birth claim brought by parents upheld), *modified*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970) (wrongful birth ruling reversed), *aff'd mem.*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

49 Stewart v. Long Island College Hosp., 30 N.Y.2d 695, 696, 283 N.E.2d 616, 617, 332 N.Y.S.2d 640, 641 (1972).

50 410 U.S. 113 (1973).

51 *See, e.g.*, Greenberg v. Kliot, 47 App. Div. 2d 765, 367 N.Y.S.2d 966 (1975) (dismissing claim for wrongful birth, even though alleged negligent acts occurred after Legislature had legalized abortions performed within 24 weeks of conception); cases cited *infra* note 52.

52 *See, e.g.*, Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (recognizing wrongful birth cause of action); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (same); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977) (same); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (same); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (same).

man had the constitutional right to terminate her pregnancy,[53] the public policy argument against recognition of the wrongful birth action was substantially weakened.[54] Accordingly, courts began to hold that the failure of a physician to advise a woman of the possibility of birth defects in her unborn child would lead to damages cognizable at law, because such failure deprived a woman of a meaningful opportunity to exercise the right to terminate her pregnancy.[55] In 1979, the New Jersey Supreme Court followed that trend in the law by overruling its earlier wrongful birth holding in *Gleitman*. In *Berman*, the supreme court held that the parents of a child wrongfully born with birth defects could recover monetary damages for emotional distress.[56] Wrongful birth actions are now recognized in all jurisdictions that have considered the issue.[57]

In marked contrast to the acceptance of wrongful birth causes of action, wrongful life claims continued to be denied throughout the 1970's.[58] The only court that accorded recognition to such claims was the Appellate Division of the Supreme Court of New York, which decided two companion cases in December 1977.[59] Although those decisions initially seemed to

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53 In *Roe v. Wade*, the United States Supreme Court held that the constitutional right of privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 154.

54 The New Jersey Supreme Court made this explicit in *Berman v. Allan*. *See supra* note 14. The *Berman* court noted that, in view of the *Roe* decision, public policy now supported the proposition that a woman should not be deprived of a meaningful opportunity to make the decision to abort. *Berman*, 80 N.J. at 432, 404 A.2d at 14.

55 *See Berman*, 80 N.J. at 432, 404 A.2d at 14.

56 *Id.* at 434, 404 A.2d at 15.

57 *See, e.g.*, Robak v. United States, 658 F.2d 471 (7th Cir. 1981) (applying Alabama law); Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981); and Eisbrenner v. Stanley, 106 Mich. App. 351, 308 N.W.2d 209 (1981); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 478, 656 P.2d 483, 494 (1983); *see also* cases cited *supra* note 52.

58 *See, e.g.*, Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (plaintiffs sustained no damages cognizable at law); Lapoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976) (no cause of action for wrongful life because no proximate cause); Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975) (wrongful life claim denied); Elliott v. Brown, 361 So. 2d 546 (Ala. 1978) (same); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (plaintiffs sustained no damages cognizable at law); Johnson v. Yeshiva Univ., 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977) (issue not reached, as defendants held not negligent); Karlsons v. Guerinot, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (1977) (wrongful life claim denied); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (same).

59 In Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *rev'd sub nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978), the appellate division upheld a lower court ruling denying the defendants' motion to

mark a breakthrough for wrongful life claims, both decisions were quickly reversed by the New York Court of Appeals.[60]

Two years later, a California court of appeals upheld the wrongful life cause of action in *Curlender v. Bio-Science Laboratories*.[61] Because of deficiencies in the *Curlender* court's reasoning and conclusions, however, the decision was deprived of much potential significance.[62] In reaching its decision, the *Curlender* court glossed over any differences between the wrongful life claim and a traditional medical malpractice claim.[63] Consistent with this approach, the court allowed general damages for pain and suffering as well as special damages for financial losses attributable to the child's affliction.[64] Because the *Curlender* court failed to focus on the distinctive features of the wrongful life claim, its decision was to have little, if any, precedential value.[65]

In 1980 and 1981, wrongful life claims were raised in three additional jurisdictions, and in each case recognition of the claim was refused.[66] Then, in 1982, came the major breakthrough that

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dismiss a wrongful life claim, even though it admitted there was no precedent for its ruling. *Park*, 60 A.D.2d at 82, 400 N.Y.S.2d at 112. In the companion case of Becker v. Schwartz, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *rev'd*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978), the appellate division reversed the trial court's dismissal of a wrongful life claim for failure to state a cause of action, citing its decision in *Park*. *Becker*, 60 A.D.2d at 588, 400 N.Y.S.2d at 120.

60 *See* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

61 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980). The *Curlender* action was brought on behalf of a child who was afflicted with Tay-Sachs syndrome, a fatal affliction resulting in a very reduced life span. *Id.* at 816 & n.4, 165 Cal. Rptr. at 480 & n.4.

62 Symptomatic of these deficiencies was the *Curlender* court's dictum that parents were potentially liable in a wrongful life action if they chose to proceed with a pregnancy, knowing that the child would be born with defects. *Id.* at 830, 165 Cal. Rptr. at 488. Shortly thereafter, California passed legislation relieving parents of any liability in a situation such as this. *See* Turpin v. Sortini, 31 Cal. 3d 220, 228, 643 P.2d 954, 959, 182 Cal. Rptr. 337, 342 (1982).

63 *Curlender*, 106 Cal. App. 3d at 829, 165 Cal. Rptr. at 488. The opinion emphasized that "[t]he reality of the 'wrongful life' concept is that such a plaintiff *exists* and *suffers*, due to the negligence of others . . . . We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all." *Id.* (emphasis in original).

64 *Id.* at 831-32, 165 Cal. Rptr. at 489. Damages for pain and suffering were allowed for the limited life span of the child, which was estimated to be approximately four years. *Id.*

65 The *Curlender* decision was not followed even when the California Supreme Court later recognized the wrongful life cause of action. *See infra* note 69 and accompanying text.

66 *See* Phillips v. United States, 508 F. Supp. 537 (D.S.C. 1981); Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981); Eisbrenner v. Stanley, 106 Mich. App. 351, 308 N.W.2d 209 (1981); *see also* Speck v. Finegold, 497 Pa. 77, 439 A.2d 110

proponents of the cause had been hoping for. The California Supreme Court became the first state supreme court to consider and recognize wrongful life as a cause of action when it rendered its decision in *Turpin v. Sortini*.[67]

The *Turpin* court considered a claim brought by parents on behalf of their daughter, who was born with hereditary deafness.[68] The parents sought both general damages for an alleged right of a child to be born without defects, and special damages for the extraordinary expenses that their daughter would incur as a result of her affliction.[69] In reaching its decision, the *Turpin* court examined the reasoning applied by the California court of appeals in *Curlender*, but declined to adopt it.[70] Instead, the California Supreme Court in *Turpin* addressed what it regarded as the basic objection to the wrongful life cause of action—the notion that public policy mandated the conclusion that impaired life is to be preferred to nonlife as a matter of law and that recognition of the wrongful life claim would implicitly " 'disavow' the sanctity and value of less-than-perfect human life."[71]

The *Turpin* court had a dual response to that objection. First, it noted simply that it did not believe that awarding damages to a child with severe birth defects would disavow the sanctity of life.[72] Second, the court refused to accept the assertion that California's public policy established that, as a matter of law, impaired life was always preferable to nonlife.[73] It noted, for example, that the California Legislature had found that an adult whose condition was terminal had the right to decide whether to

(1981) (upholding earlier Pennsylvania case law denying wrongful life cause of action).

67 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

68 *Id.* at 224, 643 P.2d at 965, 182 Cal. Rptr. at 339. The parents additionally alleged that the doctors had misdiagnosed their older daughter Hope, who was also born deaf, and whose condition, if properly diagnosed, would have revealed a significant probability of defects in any future offspring. *Id.* at 224-25, 643 P.2d at 965, 182 Cal. Rptr. at 339.

69 *Id.* at 225, 643 P.2d at 956, 182 Cal. Rptr. at 339.

70 *Id.* at 232, 643 P.2d at 960-61, 182 Cal. Rptr. at 344. Noting the fact that the infant plaintiff never had a chance to be born whole, and that the defendants had not caused the child's defects, the court criticized the *Curlender* analysis since it ignored the basis of the defendants' alleged wrong and thereby failed to distinguish between wrongful life and ordinary prenatal injury claims. *Id.*

71 *Id.* at 233, 643 P.2d at 961, 182 Cal. Rptr. at 344 (citing *Berman*, 80 N.J. at 430, 404 A.2d at 13).

72 *Id.* at 234, 643 P.2d at 961-62, 182 Cal. Rptr. at 344-45. The *Turpin* court did not provide any reasons for its assertion. Therefore, its position was little more than an evasion of the issue.

73 *Id.* at 234, 643 P.2d at 962, 182 Cal. Rptr. at 345.

have life-sustaining procedures withdrawn.[74] The court admitted, however, that such a finding was not applicable to the present case because, although a jury might conclude that some conditions are worse than no life at all, such a conclusion was unlikely where the plaintiff's only affliction was deafness.[75]

Without further discussing the validity of the wrongful life action, the *Turpin* court focused on the question of general damages. The court asserted that, in the context of a wrongful life claim, "a rational, nonspeculative determination of a specific monetary award . . . appears to be outside the realm of human competence."[76] The court concluded, however, that special damages for medical costs should be allowed, because they were readily ascertainable.[77] In addition, the court opined that it would be illogical to allow the child's medical costs to be recovered by the parents but not by the child, especially since the parents might be unable to bring suit under certain circumstances.[78] The *Turpin* court's decision was based largely on the importance that it placed on assuring recovery for the child's extraordinary medical expenses. By limiting recovery in that manner, the court was also able to avoid the criticism that recovery for wrongful life would implicitly disavow the sanctity of life.[79]

The *Turpin* decision was followed in 1983 by *Harbeson v. Parke-Davis, Inc.*,[80] a case involving two infants born with birth defects, allegedly as a result of the mother's use of Dilantin during pregnancy.[81] In *Harbeson*, the Washington Supreme Court followed closely the reasoning of the *Turpin* court, both in recognizing the wrongful life action[82] and in allowing specific, but not

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74 *Id.* The *Turpin* court admitted that an unborn child cannot make such a decision. However, it added that parents, in deciding whether or not to terminate a pregnancy, presumably take into account not only their own interests, but also the interests of their unborn child. *Id.*

75 *Id.* at 235, 643 P.2d at 962, 182 Cal. Rptr. at 345.

76 *Id.* at 237, 643 P.2d at 964, 182 Cal. Rptr. at 347. In addition, the *Turpin* court cited the "benefit doctrine." Pursuant to this doctrine, damages for an injury must be mitigated by the value of any benefit conferred by the defendant's tortious conduct. *Id.* In a wrongful life action, this is particularly appropriate. As the court noted, the plaintiff had received a physical life, along with the capacity to both give and receive love, and to experience pain as well as suffering. *Id.*

77 *Id.* at 239, 643 P.2d at 965, 182 Cal. Rptr. at 348.

78 *Id.*

79 *See supra* text accompanying note 71.

80 98 Wash. 2d 460, 656 P.2d 483 (1983).

81 *Id.* at 462-63, 656 P.2d at 486.

82 *Id.* at 483, 656 P.2d at 497. Adopting the *Turpin* court's view of the problem, the *Harbeson* court raised the question whether recognition "would represent a disavowal of the sanctity of a less-than-perfect human life." *Id.* at 481, 656 P.2d at 496.

general damages.[83] The most distinctive aspect of the *Harbeson* court's decision was its effort to fit the wrongful life action into the traditional tort system—something the *Turpin* court had not attempted to do.[84] The *Harbeson* court rejected the argument that there was no injury and no proximate cause in a wrongful life action because the doctors' negligence had not caused the infants' defects.[85] Instead, the court stated that but for the negligence of the doctors, the infant plaintiffs would not have incurred the extraordinary medical expenses incident to their condition.[86] From this, it concluded that a finder of fact could properly determine that the doctors' negligence was a proximate cause of the plaintiff's injuries.[87]

By the end of 1983, the wrongful life cause of action had been recognized in California and Washington,[88] but rejected in ten other jurisdictions,[89] including New Jersey.[90] On August 1, 1984, however, the New Jersey Supreme Court in *Procanik v. Cillo*[91] became the third court to recognize the wrongful life cause of action. In granting such recognition, it also became the first state supreme court to overrule its own prior decisions with respect to wrongful life claims. Accordingly, the decision of the *Procanik* court supports the view that acceptance of the wrongful life action is a growing trend, which is likely to win additional adherents in the years ahead. It also indicates that recovery for wrongful life claims will continue to be limited to special damages for extraordinary medical costs. Despite the impact of the

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The *Harbeson* court did not analyze this issue, however, but simply asserted that to award damages for medical costs arising from an infant's birth defects did not seem to be such a disavowal. *Id.* at 482, 656 P.2d at 497.

83 *Id.* at 483, 656 P.2d at 497. The *Harbeson* court evinced an attitude similar to that of the *Turpin* court in holding that the wrongful life cause of action was necessary to assure that the child's medical needs would be met. The majority felt that since the child's needs would not suddenly disappear upon his attaining majority, the burden of the medical expenses in many cases would fall on either the child's parents or on the state. *Id.* at 479, 656 P.2d at 495.

84 *Compare infra* text accompanying notes 85-87 (discussing *Harbeson*) *with supra text* accompanying notes 70-76 (discussing *Turpin*).

85 *Harbeson*, 98 Wash. 2d at 483, 656 P.2d at 497.

86 *Id.*

87 *Id.*

88 *See supra* text accompanying notes 67 & 82.

89 New Jersey, Texas, Ohio, Wisconsin, New York, Alabama, Pennsylvania, South Carolina, Florida, and Michigan were the ten jurisdictions that had denied the wrongful life cause of action as of 1983. *See supra* notes 41, 55, 57 & 64.

90 The cause of action had first been denied recognition in *Gleitman*, and this denial was later affirmed in *Berman*. *See supra* notes 38-46 & 56; *infra* note 98 and accompanying text.

91 *See Procanik*, 97 N.J. at 352, 478 A.2d at 762.

decision, however, the majority's opinion has left unanswered some basic issues, which will need to be addressed in the future as claims of this type continue to be brought before the courts.[92]

As a prelude to its analysis, the New Jersey Supreme Court in *Procanik* reviewed its prior decisions in both wrongful birth and wrongful life cases.[93] Writing for the majority, Justice Pollock noted that in its 1967 decision in *Gleitman*, the court had declined to recognize either cause of action.[94] He asserted that in the intervening years the court had reassessed the rights both of pregnant women and infants, primarily because of the decision by the United States Supreme Court in *Roe v. Wade*.[95] Justice Pollock observed that the New Jersey Supreme Court, relying on *Roe*, had recognized the wrongful birth action in *Berman*, and had allowed the parents of a deformed child to recover damages for their emotional suffering.[96] At the same time, however, the *Berman* court had denied recovery for medical and other expenses incurred in raising the child.[97] The *Berman* majority, Justice Pollock observed, also had "declined to recognize a cause of action in an infant born with birth defects[,]" reasoning that even life with serious defects is preferable to nonexistence.[98] Finally, the *Procanik* majority noted that the supreme court's subsequent holding in *Schroeder v. Perkel*[99] had modified the *Berman* decision by allowing recovery in a wrongful birth action for extraordinary medical, hospital and related expenses.[100] Because no claim on behalf of an infant had been raised in *Schroeder*, the court chose not to

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92 *See infra* text accompanying notes 134 & 140 (identifying such issues).

93 *Procanik*, 97 N.J. at 345-47, 478 A.2d at 758-60. The court noted that it was "survey[ing] again the changing landscape of family torts." *Id.* at 345, 478 A.2d at 758.

94 *Id.* at 345-46, 478 A.2d at 759; *see supra* text accompanying notes 43-47.

95 *Procanik*, 97 N.J. at 346, 478 A.2d at 759.

96 *Id.* at 346-47, 478 A.2d at 759.

97 *Id.* at 347, 478 A.2d at 759 (citing *Berman*, 80 N.J. at 432, 404 A.2d at 14). The *Berman* court had noted that, in effect, the parents wanted to retain the benefits of having a child, while placing the enormous financial burden of her rearing upon the defendants. It concluded that this would constitute a windfall to the parents and would place too great a burden upon the physicians. *Berman*, 80 N.J. at 432, 404 A.2d at 14.

98 *Procanik*, 97 N.J. at 347, 478 A.2d at 759 (citing *Berman*, 80 N.J. at 428-30, 404 A.2d at 12-13).

99 87 N.J. 53, 432 A.2d 834 (1981).

100 *See Procanik*, 97 N.J. at 347, 478 A.2d at 760 (citing *Schroeder*, 87 N.J. at 68, 432 A.2d at 841). The damages sought by the Schroeders were medical, hospital, and pharmaceutical expenses necessary for their son's survival. These damages were found to be proportionate to the wrong of defendants, unlike the normal expenses of raising a child which had been sought by Mr. and Mrs. Berman. *Schroeder*, 87 N.J. at 68, 432 A.2d at 841.

consider such a claim at that time.[101] In concluding its survey, the *Procanik* court declared that the time for reconsideration of the right of an infant to recover damages in a wrongful life claim had arrived.[102]

The *Procanik* court began its analysis by recognizing that the defendant doctors had owed a duty to the infant plaintiff, Peter Procanik.[103] Justice Pollock assumed that the doctors had been negligent in their treatment of Rosemarie Procanik, and that their negligence had deprived her of the option of terminating her pregnancy.[104] The court then indicated that the duty owed to the child had been breached, though it did not offer any substantiation for that conclusion.[105]

Having paid this brief homage to traditional tort terminology, the *Procanik* court next reviewed the policy considerations that had led it to deny the wrongful life claim in the past. According to the court, the threshold problem of a wrongful life claim arises from the implicit claim by the child that he should not have been born.[106] In the court's view, that assertion ran counter to the policy position "that life, no matter how burdened, is preferable to non-existence . . . ."[107] That policy had been the basis of the court's holding in *Berman*—that the child had suffered no injury cognizable at law.[108] In addition, Justice Pollock acknowledged that the supreme court previously had been troubled by the difficulty in measuring damages for wrongful life.[109]

Focusing primarily on the issue of assessing damages, the *Procanik* court surveyed decisions in other jurisdictions that had

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101 *Schroeder*, 87 N.J. at 66, 432 A.2d at 840.

102 *Procanik*, 97 N.J. at 347, 478 A.2d at 760.

103 *Id.* at 348, 478 A.2d at 760.

104 *Id.* at 348-49, 478 A.2d at 760.

105 *Id.* at 349, 478 A.2d at 760. There was no doubt that the doctor owed a duty to both the infant, Peter Procanik, and to his mother. Additionally, the court properly presumed, for purposes of analysis, that the doctors breached their duty to Rosemarie Procanik. That presumption, however, does not necessarily lead to the conclusion that the doctors similarly breached their duty to the child. The court unfortunately blurs this distinction and gives the impression that a breach of duty was established. This deficiency in the court's analysis is evinced by the statement that "[n]otwithstanding recognition of the existence of a duty and its breach, policy considerations have led this Court in the past to decline to recognize any cause of action in an infant for his wrongful life." *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*, 478 A.2d at 761.

dealt with wrongful life claims. It recognized that two intermediate appellate courts had awarded general damages for wrongful life, only to be overruled by the highest tribunals in their respective states.[110] Moreover, Justice Pollock observed that other courts had found it impossible to overcome the problems posed by the issue of damages.[111] Then, reviewing again the prior New Jersey decisions on wrongful life, the *Procanik* court noted that both the majority and dissent in *Berman*, as well as the dissenting justices in *Gleitman* and *Schroeder*, had asserted that if such damages could be measured by acceptable standards, then recovery would be appropriate.[112]

The *Procanik* court's reference to *Schroeder* at that point in its analysis must be viewed as significant. In *Schroeder*, the supreme court had allowed recovery for extraordinary medical expenses in a wrongful birth case, holding that such damages were not only certain but predictable.[113] By implication, if the objection to a wrongful life claim were simply that damages were impossible to measure, then *Schroeder*'s conclusion that extraordinary medical expenses were predictable would make the claim acceptable.

That analysis was not completely apposite, however, because *Schroeder* was a wrongful birth rather than a wrongful life case. Thus, despite their predictability, the fact that medical expenses are recoverable in the former instance does not necessarily mean that they should be recoverable in the latter. A child's damages do not necessarily follow from the fact that his parents have suffered an injury cognizable at law. The salient question is whether the child himself has suffered such an injury.

While there was no express acknowledgment of this analytical problem, the *Procanik* court's awareness of it was evidenced by the court's discussion of the interdependence of the family, a theme previously developed in *Schroeder*.[114] Justice Pollock cited language from the *Schroeder* opinion, which had described the family as "a web of interconnected legal interests," in which a direct injury to one member may also constitute an indirect in-

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110 *Id.*; *see* Curlender v. Bio-Science Laboratories, Inc., 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980) (overruled by *Turpin*); Becker v. Schwartz, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *rev'd*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S. 110 (1977), *rev'd sub nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

111 *Procanik*, 97 N.J. at 350, 478 A.2d at 761.

112 *Id.*

113 *Id.* at 351, 478 A.2d at 761.

114 *Id.* (citing *Schroeder*, 87 N.J. at 63-64, 432 A.2d at 839).

jury to others.[115] Utilizing that reasoning, the *Procanik* court declared that recovery of extraordinary medical expenses in a wrongful life action, either by the parents or by the child, is justified by the fact that the doctor's negligence has an impact on the entire family.[116]

Unfortunately, the court did not elaborate on that conclusion; rather, it relied upon principles of equity, asserting that "[l]aw is more than an exercise in logic," and that logic must yield when injustice would result.[117] Referring to the California Supreme Court's assertion in *Turpin* that the right to recover damages for extraordinary medical expenses should not be contingent upon the "wholly fortuitous circumstance of whether the parents are available to sue," Justice Pollock concluded that the *Procanik* case presented that very situation.[118] Although the parents' claim was barred by the statute of limitations, the court held that the time bar would not operate absolutely to foreclose recovery for the medical treatment of their son, especially because such expenses were reasonably predictable.[119] Accordingly, the *Procanik* court held that either the child or his parents can recover for extraordinary medical costs incurred during his infancy, and, additionally, the child may recover those costs during his majority.[120]

The *Procanik* court then provided additional support for its holding. Justice Pollock viewed the court's decision as consonant with decisions that had recently been rendered by the Supreme Courts of California and Washington.[121] In what may be viewed as the most noteworthy portion of its opinion, the *Procanik* court asserted that its decision "[was] not premised on the concept that non-life is preferable to an impaired life, but [was] predicated on the needs of the living."[122] The court emphasized that, in rendering its decision, it sought "only to respond to the call of the living for help in bearing the burdens of their afflictions."[123]

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115 *Id.*

116 *Id.*, 478 A.2d at 762. The court made it clear that recovery to both the parent and child was impermissible. *Id.* at 356, 478 A.2d at 764.

117 *Id.* at 351-52, 478 A.2d at 762.

118 *Id.* at 352, 478 A.2d at 762 (citing *Turpin*, 31 Cal. 3d at 328, 643 P.2d at 965, 182 Cal. Rptr. at 348).

119 *Id.* at 352, 478 A.2d at 762.

120 *Id.*

121 *Id.*; *see supra* text accompanying notes 67-79 & 80-87 (discussing *Turpin* and *Harbeson*—decisions that accorded recognition to wrongful life cause of action).

122 *Procanik*, 97 N.J. at 353, 478 A.2d at 763.

123 *Id.*

Having accorded recognition to Peter Procanik's wrongful life claim for special damages, the supreme court next considered the question of general damages for pain and suffering and for a diminished childhood. It was there that Justice Pollock acknowledged the problems inherent in comparing an impaired life to nonexistence.[124] In considering the question of general damages, the *Procanik* court found that it was unable rationally to measure or compare nonexistence with the suffering of an impaired life.[125]

The court, however, was commendably candid in acknowledging that this "irrationality" was not really at the root of its rejection of recovery of general damages. The majority noted that its rejection was based upon its evaluation that the judicial system would be unable to deal with such claims because they would necessarily arouse jurors' passions with respect to abortion, the value of life, and the fear of nonexistence.[126] Those issues were viewed by the court as "more than the judicial system [could] digest."[127]

The *Procanik* court found the claim for diminished childhood to be even more problematic. Such a claim is based on the contention that the infant suffers an impaired childhood because his parents, unprepared for the birth of a defective child, are less able to love and care for him.[128] The court recognized that the claim contained an inherent contradiction where the parents would have used the information that was negligently withheld from them in order to prevent the birth of their child, rather than to prepare for it.[129] In addition, the court noted that the injury allegedly suffered by the child was not easily divisible from that incurred by the parents.[130]

In the final portion of its opinion, the court dispensed with the Procaniks' argument that their wrongful birth claim "should [have been] viewed as derivative from the infant's claim and, therefore, . . . should not have been dismissed."[131] The court noted that it had held in *Schroeder* that the parents' claim was independent of that of the child.[132] Consequently, the Procaniks'

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124 *Id.*
125 *Id.*
126 *Id.* at 354, 478 A.2d at 763.
127 *Id.*
128 *Id.*, 478 A.2d at 763-64.
129 *Id.* at 355, 478 A.2d at 764.
130 *Id.*
131 *Id.*
132 *Id.* at 356, 478 A.2d at 764. The court may have felt compelled to follow its

right to recover could arise only from an injury to their own independent rights, rather than from an injury to their child.[133]

In rendering its decision, the majority adopted what may be viewed as a compromise position. On the one hand, it recognized the wrongful life cause of action, at least to the extent of granting recovery for special damages. On the other hand, it limited the action by not allowing recovery for general damages. In so holding, the court steered a careful course between those who would deny recognition to the wrongful life action and those who would place it on an equal footing with an action for wrongful birth.[134] The majority's position may also be viewed as progressive, in that it advanced the law in an area that is still controversial, but in such a way as to render that position judicially acceptable.[135]

The rationale underlying the *Procanik* decision, however, is highly vulnerable. The majority failed to deal adequately with several substantive issues, including whether there is a cognizable injury to the child and whether recognition of such an injury is tantamount to holding that nonexistence is preferable to an impaired life.[136] Moreover, the majority failed to provide a cogent theory of its own to support recognition of the wrongful life action.[137] Accordingly, the *Procanik* court left in doubt not only the basis, but also the significance of its decision.[138] It also left

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own precedent in *Schroeder*, since it had rendered that decision just three years earlier.

133 *Id.*

134 When the wrongful birth cause of action was recognized in *Berman*, recovery was granted for mental and emotional anguish. *See Berman*, 80 N.J. at 434, 404 A.2d at 15. In *Schroeder*, recovery in the wrongful birth action was also granted for medical costs attributable to the child's defects. *See Schroeder*, 87 N.J. at 68-69, 432 A.2d at 841-42. Thus, at the time of *Procanik*, the New Jersey Supreme Court allowed both special and general damages for the wrongful birth cause of action. In the wrongful life cause of action, however, the *Procanik* court allowed only special damages for extraordinary medical expenses. *See Procanik*, 97 N.J. at 356, 478 A.2d at 764.

135 Dicta in the court's opinion indicates that this is the majority's own view of its decision. *See supra* text accompanying note 127.

136 *See supra* text accompanying notes 114-16 & 122-25.

137 *See supra* text accompanying note 117. The court's failure to provide a cogent theory is signaled by its open resort to principles of equity. *See Procanik*, 97 N.J. at 351-52, 478 A.2d at 762.

138 The majority's resort to principles of equity inevitably raises the question whether recognition of the wrongful life claim in this case was based solely on the fact that the parents' own claim had expired. If the decision is viewed simply in this light, its precedential value is vitiated considerably.

the decision open to attack, both by those favoring a fuller recognition of the action and by those opposing it completely.

The majority did not have to wait for such attacks to be launched by other courts or commentators. Justice Handler, in his dissent, analyzed the weaknesses of the majority's position, and he argued that the court should have allowed recovery for general as well as special damages.[139] Equally incisive was the dissent of Justice Schreiber,[140] who refused to recognize the cause of action in any form.[141] Not surprisingly, both dissenters focused on the same initial question, which they felt the majority had failed to answer: whether there is a cognizable tort in the wrongful life cause of action.[142]

Justice Handler claimed that the majority had not only failed to discuss this question adequately, but had also expressly *rejected* the claim that the child had suffered a cognizable tort.[143] Instead, according to Justice Handler, the majority's recognition of the child's right to special damages was really an extension of the parents' right of recovery.[144] He asserted that the majority had taken that position because it believed that any explicit recognition of an injury to the child, cognizable at law, would require acceptance of the proposition that nonexistence could be prefer-

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139 *Procanik*, 97 N.J. at 356-69, 478 A.2d at 764-72 (Handler, J., concurring in part and dissenting in part).

140 Between the rendering of the *Procanik* decision and the present, Justice Schreiber has retired from the New Jersey Supreme Court, having reached the mandatory retirement age. With Justice Schreiber's retirement, the supreme court has lost its last member to espouse the position orginally presented in *Gleitman*—that the value of an impaired life cannot be weighed against nonexistence.

141 *Procanik*, 97 N.J. at 369-72, 478 A.2d at 772-73 (Schreiber, J., dissenting in part).

142 Justice Handler stated this question explicitly. *Id.* at 357, 478 A.2d at 765 (Handler, J., concurring in part and dissenting in part). While Justice Schreiber cast his objections in terms of causation rather than a cognizable injury, one is readily reducible to the other. Justice Schreiber, like Justice Handler, acknowledged that the underlying problem of recognizing a cognizable tort is the policy against holding that nonexistence can be preferable to life. *Id.* at 369, 478 A.2d at 772 (Schreiber, J., dissenting in part). Without such a holding, it is impossible under traditional tort concepts to identify an injury to the child. Hence, there can be no causation either, because the defects that the child was born with are not causally related to the physician's negligence.

143 Despite the majority's apparent recognition of the wrongful life action, Justice Handler asserted that the court's opposition to the child's cause of action had "hardened into an explicit holding." *Id.* at 357, 478 A.2d at 765 (Handler, J., concurring in part and dissenting in part).

144 *Id.* at 358, 478 A.2d at 765 (Handler, J., concurring in part and dissenting in part).

able to life.[145]

In response to that position, Justice Handler presented an ingenious theory of his own. He sought to establish not only that wrongful life is based on a cognizable tort, but also that it is unnecessary for the court to take any position with respect to the preference of nonexistence over life.[146] He did this initially by further developing the concept of the familial tort,[147] which the majority had invoked for the limited purpose of justifying recovery for extraordinary medical expenses.[148]

According to Justice Handler, deprivation of the parents' right to make an informed choice regarding termination of the pregnancy is a prerequisite to the child's wrongful life claim.[149] That deprivation is an injury to the parents, and as Justice Handler noted, one that the court had already recognized in granting damages for emotional suffering in a wrongful birth cause of action.[150] He insisted, however, that emotional suffering has many facets, including guilt and shock, which he joined together under the term "diminished parental capacity."[151] As a result of this diminished capacity, parents become less able to care for and to cope with the needs of their child.[152] This, in turn, inevitably has

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145 *Id.*

146 *Id.* This theory is one which Justice Handler has developed over the years. It first appeared in *Berman*, 80 N.J. at 434-46, 404 A.2d at 15-21 (Handler, J., concurring in part and dissenting in part), and later appeared in *Schroeder*, 87 N.J. 72-78, 432 A.2d at 843-46 (Handler, J., concurring in part and dissenting in part).

147 Although Justice Pollock and Justice Handler both discussed the concept of a familial tort, only Justice Handler actually employed this terminology. *See Procanik*, 97 N.J. at 369, 478 A.2d at 771 (Handler, J., concurring in part and dissenting in part).

148 *See supra* text accompanying notes 114-16 (for majority's discussion of familial tort).

149 *See Procanik*, 97 N.J. at 358, 478 A.2d at 765 (Handler, J., concurring in part and dissenting in part).

150 *Id.* at 363, 478 A.2d at 768 (Handler, J., concurring in part and dissenting in part).

151 This term was first used by Justice Handler in *Berman*. *Berman*, 80 N.J. at 440, 404 A.2d at 18 (Handler, J., concurring in part and dissenting in part). In his opinion in *Procanik*, Justice Handler went to great lengths to establish the reality of diminished parental capacity, citing numerous works dealing with families with handicapped children. *Procanik*, 97 N.J. at 358-63, 478 A.2d at 765-68 (Handler, J., concurring in part and dissenting in part). This extensive treatment was necessitated by the fact that such alleged diminished parental capacity has never been recognized as a grounds for damages, although general emotional suffering has been established as a basis for recovery.

152 Even if such diminished parental capacity were in fact a reality, there is a question whether it could be the basis for granting damages. In such a claim, the parents would declare, in effect, that they were less able to care for their child because they were deprived of their right to prevent its birth. Although Justice

an adverse impact on the child in the form of "a diminished childhood."[153] Thus, according to Justice Handler, the cognizable tort in the wrongful life action is that of diminished childhood.[154]

In delineating this familial tort, Justice Handler claimed that its recognition would not oblige the court to "assume a Hamlet role," that is, to decide whether nonexistence could be preferred over a life that was burdened.[155] Rather, the court's only obligation would be to recognize that individuals have the right to make such a choice for themselves.[156] For Justice Handler, this is a fundamental right, at least in a "necessitous or exigent setting."[157] He identified the right as one of personal autonomy[158] and asserted that a court or a jury could validate the right without making a moral judgment of its own.[159] Therefore, in his view, the decisive issue is not the value of life, but rather the right of individual choice.[160]

If the basic issue in a wrongful life case is the right of individual choice, then the objection could be raised that it is the par-

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Handler did not discuss this aspect of the issue, the majority explicitly identified the contradiction involved. *See Procanik*, 97 N.J. at 354, 478 A.2d at 763-64.

153 *Id.* at 363, 478 A.2d at 768 (Handler, J., concurring in part and dissenting in part). The claim of diminished childhood requires that the concept of diminished parental capacity first be accepted. This explains the extensive effort by Justice Handler to establish the concept. *See id.*

154 *Id.* at 358-63, 478 A.2d at 765-68 (Handler, J., concurring in part and dissenting in part).

155 *Id.* at 358, 478 A.2d at 765 (Handler, J., concurring in part and dissenting in part).

156 *Id.* at 358-66, 478 A.2d at 765-70 (Handler, J., concurring in part and dissenting in part).

157 *Id.* at 368, 478 A.2d at 771 (Handler, J., concurring in part and dissenting in part). Although Justice Handler did not discuss the question, this putative right would apparently embrace the right to die. Such a right is implicit in Justice Handler's formulation of the wrongful life cause of action.

158 *Id.* at 364, 478 A.2d at 769 (Handler, J., concurring in part and dissenting in part).

159 *Id.* at 365, 478 A.2d at 769 (Handler, J., concurring in part and dissenting in part).

160 Justice Handler's argument seems to be consciously resonant of the current widespread debate regarding abortion, in which the two opposing positions assert, on one hand, the value of life, and on the other, the right of individual choice. Justice Handler has undoubtedly adopted the view that *Roe v. Wade* stands for a fundamental right of personal autonomy, and has extended that principle in *Procanik* into the area of the wrongful life claim. Justice Handler's assertion that a court or jury could validate an individual's right to choose nonexistence, without making a moral judgment on its own, is suggestive of the position taken by Geraldine Ferraro and others in the 1984 presidential campaign—that a public official is justified in supporting laws permitting abortion, even though personally opposed to the practice.

ents who have a cause of action and not the child, because it is the parents' right to choose that was violated. Justice Handler dealt with this problem by combining the two strands of his argument: the right of personal autonomy and the concept of a familial tort.[161] He asserted that the parents' choice to abort is a substitute judgment made on behalf of the child.[162] Therefore, even though the parents exercise their own judgment, the child does not lack a right of personal autonomy or self-determination. On the contrary, in Justice Handler's view, the parents' choice preserves the child's right.[163] Delicately balancing the concepts of familial tort and individual autonomy, he concluded that the injury in a wrongful life claim arises from the consequences that flow from depriving parents of the ability to make a choice "for themselves and their child as a family."[164]

Like Justice Handler, Justice Schreiber believed that the majority had failed to answer the question whether there was a cognizable tort in the wrongful life cause of action.[165] Justice Schreiber also believed, as did Justice Handler, that implicit in the majority's decision was the understanding that the child's cause of action was "fundamentally flawed."[166] From this common criticism of the majority's position, however, Justice Schreiber drew a conclusion diametrically opposite to that of his colleague. Rather than asserting that there indeed is a cogniza-

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161 *See Procanik*, 97 N.J. at 364-66, 478 A.2d at 769-70 (Handler, J., concurring in part and dissenting in part).

162 *Id.* at 364, 478 A.2d at 769 (Handler, J., concurring in part and dissenting in part).

163 *Id.*

164 *Id.* In a wrongful life action, the particular consequence that flows from the violation of the child's right to self-determination is, of course, that of diminished childhood. Thus, for Justice Handler, both the fundamental right that is violated, and the injury that flows from that violation, adhere to the child, wholly apart from any damages flowing to the parents for injuries sustained by them. This formulation enabled Justice Handler to assert that the court could recognize an independent cause of action in the child, in contrast to the majority's approach, wherein the child's right is little more than an extension of the parents' right. There is a problem, however, with regard to the assertion that the child has a fundamental right of personal autonomy. In a wrongful life case, the child is yet to be born. If an unborn child has a right of personal autonomy, however, the whole basis for the Supreme Court's decision in *Roe v. Wade* is undermined. By definition, a right of personal autonomy can inhere only in a person, yet *Roe* is premised on the assertion that an unborn child is not a person within the meaning of the Constitution. *Roe*, 410 U.S. at 157-60. If an unborn child were deemed to be a person, then abortion would have an entirely different legal status.

165 *See supra* note 142 and accompanying text.

166 *Procanik*, 97 N.J. at 369, 478 A.2d at 772 (Schreiber, J., dissenting in part); *see supra* note 143 and accompanying text.

ble injury underlying a wrongful life claim, Justice Schreiber opined that a tort to the child does not in fact exist.[167] Accordingly, he maintained that the court should not have granted recovery for damages of any kind.[168]

Justice Schreiber began his analysis by concurring with the majority's position denying *general* damages.[169] He based his conclusion on the idea that man cannot know whether a child born with defects " 'would have been better off not to have been born.' "[170] By quoting from Justice Weintraub's well-known dissent in *Gleitman*,[171] he aligned himself with those who have opposed the wrongful life cause of action on those grounds.

Justice Schreiber posited that once the court has recognized that there is no basis for a child to recover general damages, it is unjust to allow recovery of special damages for extraordinary medical expenses.[172] To hold that the child may recover special damages even though the underlying theory of wrongful life has failed, he maintained, would be to violate the moral code on which our system of justice is based.[173] The fundamental reason for requiring proximate causation in tort law is that it is unjust to require defendants to pay for damages that they did not cause.[174] Yet in the wrongful life cause of action, the doctors did not cause the child's birth defects. Therefore, according to Justice Schreiber, recovery of costs necessitated by those defects should not be allowed.[175] He concluded that the court should not permit its

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167 *Procanik*, 97 N.J. at 370, 478 A.2d at 772 (Schreiber, J., dissenting in part).

168 *Id.* at 371-72, 478 A.2d at 773 (Schreiber, J., dissenting in part).

169 *Id.* at 369, 478 A.2d at 772 (Schreiber, J., dissenting in part).

170 *Id.* (quoting *Gleitman*, 49 N.J. at 63, 227 A.2d at 711) (Weintraub, C.J., dissenting in part).

171 See *supra* note 47 for the extended quotation by Justice Weintraub.

172 *Procanik*, 97 N.J. at 370, 478 A.2d at 772 (Schreiber, J., dissenting in part).

173 *Id.*

174 *Id.* Justice Schreiber noted that there were two reasons which would justify awards unrelated to the plaintiff's injury. The first would be to punish wanton and willful misconduct toward the plaintiff. The second would be to deter doctors from negligently failing to advise parents of the risks of birth defects in their unborn children. In regard to the first circumstance, no such misconduct was present in this case. Indeed, as Justice Schreiber noted, the majority had accepted the fact that the doctors did not direct any misconduct toward the plaintiff. In regard to the second, Justice Schreiber felt that allowing recovery for special damages in a wrongful life claim would have no real deterrent effect. The costs imposed on the defendants would be borne by the public through the medium of insurance. In addition, parents already have a malpractice claim arising from the doctors' negligence in failing to advise them properly. Thus, any possible deterrent effect already exists. *Id.* at 370-71, 478 A.2d at 772-73 (Schreiber, J., dissenting in part).

175 *Id.* at 370, 478 A.2d at 772 (Schreiber, J., dissenting in part).

sympathy for a child born with defects to cause it to ignore the principles of responsibility and causation that underlie our system of justice.[176]

Although Justices Handler and Schreiber expressed diametrically opposite views on the wrongful life cause of action, they justifiably found common ground in their criticism of the *Procanik* majority's reasoning.[177] The majority failed to identify, let alone establish, an injury cognizable at law.[178] It failed either to bring the cause of action within the purview of traditional tort analysis or to forge a cogent theory of its own.[179] Instead, the majority reached its conclusion by a series of evasions. The majority raised what it identified as the threshold question—whether nonexistence could ever be held to be preferable to an impaired life—only to avoid the problem by shifting its discussion to the measurability of damages.[180] The court avoided the problem of ascertaining an individual injury that is cognizable at law by shifting its focus to the family.[181] Even then, the implications of the familial tort were avoided by limiting recovery to the medical expenses shared by the family, but by ignoring the emotional burdens.[182] As a consequence, the familial tort was not developed as a concept in its own right. Rather, it was utilized simply for the purpose of justifying special damages and then abandoned when its logic pointed toward general damages.[183]

This lack of consistency or logic, however, does not necessarily invalidate the decision. It simply indicates that the result was reached on another basis. The majority itself made this explicit when it stated that "[l]aw is more than an exercise in logic," and that logic must yield when the result would be an injustice.[184] Thus, the court itself invited the conclusion that its decision was based upon principles of equity.

What precisely is the injustice that the court sought to remedy? In his dissent, Justice Schreiber stated that it was unjust to

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176 *Id.* at 371-72, 478 A.2d at 773 (Schreiber, J., dissenting in part).

177 *See supra* note 142 and accompanying text.

178 *See supra* text accompanying note 136.

179 *See supra* text accompanying note 137.

180 *See Procanik*, 97 N.J. at 349-51, 478 A.2d at 760-62.

181 *See supra* text accompanying notes 114-16.

182 *See supra* text accompanying notes 119-20.

183 *See supra* text accompanying notes 114-16 & 124-25. An attempt at a more complete exploration of the so-called familial tort, including recognition of the right to recover for emotional damages, is carried out by Justice Handler in his dissent. *See supra* text accompanying notes 134-54.

184 *Procanik*, 97 N.J. at 351-52, 478 A.2d at 762.

require the defendants to pay for damages they did not cause.[185] The majority, on the contrary, determined that it was unjust to impose upon parents the "crushing burden of extraordinary expenses" if they were precluded from bringing suit.[186] The majority further stated that the case *sub judice* illustrated just that point. Because the parents' action was time barred, there would be no recovery unless a cause of action could be brought by the child.[187]

The argument that recognition of the wrongful life cause of action is needed in order to assure recovery was also used by the *Turpin* and *Harbeson* courts.[188] This lends weight to Justice Handler's contention that the cause of action was not recognized in its own right, but only as an extension of the parents' right to recover.[189] To the extent that the *Procanik* decision is read in this light, its precedential value will be limited.[190] Other courts sharing these equitable concerns will be encouraged to join in recognizing the wrongful life cause of action. The cause of action will remain limited, however, to an award for special damages where such recovery is not available to the parents. By establishing this limitation, recognition of the wrongful life action will be the final development in this area of tort law.[191]

The true basis of the *Procanik* decision, however, extends beyond simply providing assurance of recovery when the parents' claim is precluded. When faced with a problem of this kind, courts generally can find an equitable way to restore the parents' claim.[192] Certainly, in addressing the equitable needs of an indi-

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185 *See supra* text accompanying note 174.

186 *Procanik*, 97 N.J. at 352, 478 A.2d at 762.

187 *Id.*

188 *See supra* text accompanying note 78; *see also supra* note 83.

189 *See supra* text accompanying note 144. Only some of the damages which the parents may recover on their own behalf are assured by extending the right of recovery to the child. The parents may recover for emotional damages, but the child may not.

190 *See supra* note 138.

191 This line of development began with *Roe*, which recognized the mother's right to abort, and continued through to *Berman* and *Schroeder*, which recognized the wrongful birth cause of action.

192 This was done in a recent case decided by the Texas Supreme Court, Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984). The *Nelson* court held that the infant plaintiff had no cause of action for wrongful life. *Nelson*, 678 S.W.2d at 925. At the same time, it invalidated a medical malpractice statute of limitations which barred the parents' claim for wrongful birth. *Id.* at 923. In the *Procanik* case, the parents argued that their claim was not time-barred, on the grounds that it was derivative of the child's claim. The court felt constrained from accepting this view, however, noting that it had declared just three years earlier, in *Schroeder*, that the parents'

vidual case, it is simpler and more appropriate to revive the parents' claim than to create an entirely new cause of action in the child, especially where the cause of action is as controversial as a claim for wrongful life. Thus, the very fact that the *Procanik* court chose to recognize the infant's cause of action indicates that it believed there was a deeper injustice involved—one that went to the heart of the wrongful life claim—the infant plaintiff's life itself.

Although the *Procanik* court was restrained from declaring that the plaintiff's life could be an injury cognizable at law, it is clear that the majority believed that such an impaired life was an injustice, one that the majority would compensate by allowing special damages. This is demonstrated by the court's comments regarding its denial of recovery for general damages. While a rationale was provided for this denial,[193] the court stated openly that "[u]nderlying our conclusion is an evaluation of the judicial system to appraise such a claim."[194] The claim of the plaintiff—that he would be better off if he had never been born—was rejected, not because it was impossible to affirm, or was contrary to public policy, but because "[s]uch a claim would stir the passions of jurors about the nature and value of life, the fear of non-existence, and about abortion."[195] The court concluded that "[this] mix is more than the judicial system can digest."[196] By employing that language, the court clearly signaled that nonexistence could be regarded as preferable to an impaired life, and that a negligent act that allowed such life to come into existence could be an injustice, even though the act did not cause the impairment itself. These underlying conclusions were not made the basis of the decision, however, because of the court's estimation that the judicial system was incapable of dealing with these issues.

This leads inevitably to question the position the court might take if it decided that the judicial system had developed that capacity. The *Procanik* decision itself, with its partial recognition of

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claim was independent. *See Procanik*, 97 N.J. at 356, 478 A.2d at 764. Whether the court would have been so constrained had it wished to revive the parents' claim, or whether it could have found another means for doing so, are moot questions. In any case, the Procaniks were not without recourse. Even if the court could find no way to revive their claim for wrongful birth, they still had a claim for legal malpractice, arising out of the failure to bring an action for wrongful birth within the required time.

193 *See supra* text accompanying note 125.

194 *Procanik*, 97 N.J. at 354, 478 A.2d at 763.

195 *Id.*

196 *Id.*

the wrongful life cause of action, could help to prepare the system in this way, as would recognition of wrongful life claims by other courts.[197] Dicta in the *Procanik* decision indicates that the supreme court would be willing to take notice of any increased judicial capacity and to give it broader effect.[198] In that event, the *Procanik* decision would not be the final development of this area of tort law, but rather would be a step in its further evolution.

It is impossible to predict with certainty the specific holdings that would result from future judicial initiatives in this area. One possible development might be a broadening of recovery under the wrongful life claim. There is no logical reason for not allowing general damages for pain and suffering, as is done routinely in medical malpractice cases, once the threshold problem regarding the relative value of impaired life has been overcome. In addition, it is foreseeable that the court could adopt Justice Handler's view regarding the familial tort and thus extend recovery to damages arising from a diminished childhood. Another possibility, however, would be the development of judicial decisions covering a range of issues beyond that of an infant plaintiff's wrongful life. These issues include both suicide and euthanasia,[199] and are currently grouped together under the general rubric of a right to die.[200] It is in this highly volatile area that the most serious implications of the *Procanik* decision lie.

In considering these controversial issues, the New Jersey Supreme Court could adopt the arguments presented by Justice Handler in his dissent. Utilizing the concepts of both personal autonomy and the familial tort, the court could both broaden the wrongful life action and develop a right to die applicable to other claims and issues.[201] These concepts, however, present their own

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197 Since *Procanik* was decided, only one other state supreme court has considered the wrongful life cause of action. *See* Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984).

198 *Procanik*, 97 N.J. at 354, 478 A.2d at 763. In addition, dicta in *Turpin* indicates that the California Supreme Court would also be prepared to base future decisions on an explicit rejection of the public policy that an impaired life is always preferable to nonexistence. *See supra* text accompanying notes 73 & 74.

199 Euthanasia has potential application to many groups, including the terminally ill, those suffering great pain, infants born with birth defects, and the nonfunctional elderly.

200 *See supra* note 157.

201 Although not basing its decision on Justice Handler's dissent in *Procanik*, the New Jersey Supreme Court developed a right to die in *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985). In that decision, the court held that life-sustaining treatment may be withdrawn or withheld from a nursing home patient who suffers from severe and permanent impairments and a limited life expectancy. If the patient is

difficulties, and as a result, the court is unlikely to adopt this approach.[202] Nevertheless, recognition of a right to die could be based in part on the court's determination that under certain circumstances nonexistence is preferable to an impaired life. Although the *Procanik* decision does not rest explicitly on this conclusion, both the influence of the holding itself and the court's dicta lead in this direction. Therefore, the *Procanik* decision should not be viewed just as an equitable remedy, but rather as an incremental advance in the creation of a right to die.

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competent, he may make the choice regarding treatment. *Id.* at 355, 486 A.2d at 1226. If the patient is not competent, a substitute decisionmaker may make the choice under a variety of tests. These tests are based on the degree to which it can be determined whether the patient would have declined treatment and the degree to which the burdens of the patient's continued life outweigh the benefits. *Id.* at 360-61, 365-67, 486 A.2d at 1229, 1232.

202 *See supra* notes 151-52 & 164.