RIGHTS GONE WRONG: A CASE AGAINST WRONGFUL LIFE

TABLE OF CONTENTS

INTRODUCTION

In Dostoevsky's *The Idiot*, Ippolit Terentyev, a terminally ill young man, muses on his illness and impending death: "I will die looking straight into the wellspring of force and life, and I will not want this life! If it had been in my power not to be born, I probably would not have accepted existence on such derisive conditions."[1] Can existence ever be such that nonexistence is preferable? If so, can the mere fact of a person's existence become a legally compensable injury? Wrongful life claims, a specific variety of medical malpractice claim, require courts to grapple with this exact question. In a wrongful life suit, a disabled child plaintiff—through her parents—sues a physician or genetic counselor who failed to diagnose the likelihood of disability such that the mother could have chosen to terminate the pregnancy. In American jurisprudence, courts have largely refused to recognize wrongful life; only four states allow recovery, and to a limited degree only based on a desire to address the plaintiff's medical needs.[2] The courts in the majority reason that allowing a child to sue alleging that she should never have been born would require courts to classify a person's very life as an injury and compute damages by comparing the values of a disabled existence and complete nonexistence.[3] The majority views these issues as highly personal, philosophical inquiries into the meaning of life, which lie beyond the realm of judicial competence; accordingly, the majority has avoided recognizing the cause of action.[4]

Regardless of the near-uniform consensus against recognizing wrongful life, the issue continues to cause controversy. On May 6, 2015, the Supreme Court of Pennsylvania heard a case challenging the state's statutory ban on the cause of action.[5] Within the past two

1. FYODOR DOSTOEVSKY, THE IDIOT 414 (Richard Pevear & Larissa Volokhonsky trans., Vintage Classics 2003) (1869).

2. For a useful summary of the decisional law by jurisdiction, see Gregory G. Sarno, Annotation, *Tort Liability for Wrongfully Causing One to Be Born*, 83 A.L.R.3d 15 (1978) (under "Tables, Laws, and Rules").

3. *See infra* notes 14-15 and accompanying text.

4. *See infra* notes 19-20 and accompanying text.

5. *See* Chris Potter, *State Supreme Court Hears 'Wrongful Life' Case*, PITTSBURGH POST-GAZETTE (May 17, 2015, 12:00 AM), http://www.post-gazette.com/news/state/2015/05/17/Pennsylvania-State-Supreme-Court-hears-wrongful-life-case/stories/201505170127 [https://

years, various foreign courts have had to determine for the first time whether to recognize wrongful life as a cause of action.[6] Additionally, a recent trend in scholarship has emerged, arguing for broader recognition and availability of recovery for wrongful life claims, either by ignoring the uncomfortable issues courts have grappled with or by attempting to resolve them in favor of allowing recovery.

This Note examines this scholarly trend, hoping to clarify the issues surrounding wrongful life with which courts, at home and abroad, continue to struggle. This Note concludes that none of the proffered justifications for wrongful life provides a completely coherent account of the claims under existing legal frameworks. It then considers more far-reaching problems with recognizing wrongful life and concludes that wrongful life claims require impermissible judicial valuations of life and a conception of individual rights that, at the same time, depends upon and is foreclosed by *Roe v. Wade*.[7] Because the difficulty of wrongful life ultimately stems from the questions it raises about the meaning and value of human life, no satisfactory solution can ignore these philosophical questions. This Note therefore offers a philosophical explanation of, and tentative solution to, the wrongful life problem, which informs a practical

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perma.cc/8JCT-L7T4]. Although the plaintiffs have challenged the law for technical reasons, alleging that it violates the Pennsylvania Constitution's "single subject" requirement for legislation, the suit has reopened the debate about wrongful life more generally. *See id.*

6. For example, the South African Constitutional Court recently had to consider whether South African law permits the cause of action. *See* Sapa, *ConCourt to Hear Downs* [sic] *Syndrome Case*, CITIZEN (S. Afr.) (Aug. 27, 2014, 6:55 PM), http://citizen.co.za/234908/concourt-hear-downssyndrome-case/ [https://perma.cc/HRU5–28BY]. An unidentified mother brought a claim on behalf of her minor child who was born with Down Syndrome, alleging that a genetic testing center negligently failed to diagnose her child's condition, thus denying her the opportunity to terminate the pregnancy. *See id.* On appeal, she urged an extension of the common law to recognize a claim for "wrongful life," particularly in light of the focus on children's rights in the South African Constitution and Children's Act. *See id.* The mother subsequently changed the basis of her suit from "wrongful life" to "wrongful suffering." *See* Aarti J. Narsee, *Mother Sues for Son's Suffering*, TIMES (S. Afr.) (Aug. 29, 2014), http://www.timeslive.co.za/thetimes/2014/08/29/mother-sues-for-son-s-suffering [https://perma.cc/NA34-8JNQ]. Similarly, the European Court of Human Rights rejected a wrongful life claim brought on behalf of a Romanian child born without tibia. Press Release, European Ctr. for Law & Justice, Human Rights and Eugenics: The More Precautious Approach of the ECHR (June 27, 2014), http://eclj.org/Releases/Read.aspx?GUID=99f0fd59-b54e-45b7-a970-f3c908188032 [https://perma.cc/L7NT-D6FL]. The Court concluded that the claim was not cognizable under Romanian law or the European Convention on Human Rights, but explicitly abstained from deciding whether a handicapped child has a compensable right not to be born. *See id.*

7. 410 U.S. 113 (1973).

proposal that seeks a nonjudicial means of helping children who suffer the sort of birth defects that give rise to wrongful life suits.

Part I will trace the development of the cause of action and outline the majority and minority rules within United States jurisdictions. Part II examines defenses of wrongful life based on traditional negligence, contract, and strict liability frameworks, and finds each inadequate for measuring damages and avoiding problems outlined by courts. Part III considers rights-based justifications of wrongful life and concludes that allowing the cause of action will require impermissible judicial valuations of individuals, and that rights-based arguments require a conception of personhood that contradicts *Roe v. Wade*. Lastly, the conclusion presents a tentative solution, based on birth injury compensation programs in Florida and Virginia, that removes wrongful life plaintiffs from the courts entirely while still addressing their medical needs.

I. DEVELOPMENT OF THE CAUSE OF ACTION

The first use of the term "wrongful life" occurred in *Zepeda v. Zepeda*, in which an Illinois appellate court refused to create a new cause of action allowing an illegitimate child to sue his father for damages resulting from his status as a bastard.[8] Several years later, the seminal New Jersey case *Gleitman v. Cosgrove* extended the wrongful life concept to its now familiar disability context.[9] In *Gleitman*, the plaintiff's mother had contracted German measles during her pregnancy, which caused the plaintiff to be born with severe hearing, speech, and sight defects.[10] The plaintiff's parents brought suit on his behalf, alleging that the mother's treating physician, who knew of her German measles, had negligently failed to disclose the likelihood of birth defects such that the mother could have had an

8. *See* 190 N.E.2d 849, 858 (Ill. App. Ct. 1963). The court predicted that granting a wrongful life cause of action could have far-reaching ramifications that required deference to the legislature. *See id.* at 859; *see also* Williams v. State, 223 N.E.2d 343, 343-44 (N.Y. 1966) (denying recovery to an infant plaintiff asserting a negligence claim against the state for failure to prevent a sexual assault on his mother in a state-run mental institution that led to the plaintiff's birth out of wedlock).

9. *See* 227 A.2d 689 (N.J. 1967).

10. *Id.* at 690.

abortion.[11] The court noted at the outset of its analysis that the defendant physician did not cause the defect: nothing he could have done would have brought about a perfectly healthy child.[12] Thus, to prove proximate causation as required in tort, the plaintiff would have to classify his existence itself as the injury: "In other words, he claims that the conduct of defendants prevented his mother from obtaining an abortion which would have terminated his existence, and that his very life is 'wrongful.'"[13]

The *Gleitman* court ultimately refused to recognize the plaintiff's claim based on his inability to establish an injury that the court could compensate.[14] The court based its denial on its inability to evaluate the relative values of disabled existence and "the utter void of nonexistence," a necessary inquiry to establish damages.[15] "By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies."[16]

Although New Jersey itself has now overruled *Gleitman* in favor of allowing limited recovery,[17] the current majority rule follows *Gleitman* and holds that damages are unavailable to a disabled plaintiff.[18] States have variously made the cause of action unavail-

11. *Id.* at 690-91.
12. *See id.* at 692.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *See* Berman v. Allan, 404 A.2d 8, 14-15 (N.J. 1979).
18. In denying the cause of action, the Supreme Judicial Court of Massachusetts noted that denying recovery is "[t]he almost universal rule in this country." Viccaro v. Milunsky, 551 N.E.2d 8, 12 (Mass. 1990).

able by judicial decision[19] or by statute.[20] Courts perceive the same general difficulty with a tort theory of wrongful life as the *Gleitman* court did: because the physician did not cause the disability, establishing causation requires the harm to be existence, not the disability, and courts are not equipped to measure existence versus nonexistence.[21] The position the New York Court of Appeals adopted in denying the cause of action nicely summarizes the dominant attitude: "Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians" than the judicial system, "particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence."[22]

A minority of states, however, permit a wrongful life plaintiff limited recovery. Seeking to avoid judicial valuations of childrens' lives, the minority states limit recovery to the child's medical expenses, pain, and suffering. The first state to do so, and to reject the reasoning of the majority of the states, was California in the 1980

19. *See, e.g.*, Pizano *ex rel.* Walker v. Mart, 790 P.2d 735, 741 (Ariz. 1990) ("Bringing a child into the world—even one who is impaired—is not a legally cognizable injury to that child. Thus, children suffer no legal injury when a parent, doctor, or other practitioner fails to prevent their birth."); Lininger *ex rel.* Lininger v. Eisenbaum, 764 P.2d 1202, 1212 (Colo. 1988) (dismissing a wrongful life claim because plaintiff's life "cannot rationally be said to be a detriment to him when measured against the alternative of his not having existed at all"); Garrison v. Med. Ctr. of Del. Inc., 581 A.2d 288, 294 (Del. 1989) ("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.").

20. *See, e.g.*, IDAHO CODE ANN. § 5-334(1) (West 2015) ("A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted."); MICH. COMP. LAWS ANN. § 600.2971(2) (West 2015) ("A person shall not bring a civil action for damages on a wrongful life claim."); N.D. CENT. CODE ANN. § 32-03-43 (West 2015) ("No person may maintain a claim for relief or receive an award for damages on that person's own behalf based on the claim that, but for the act or omission of another, that person would have been aborted."). West Virginia courts echo *Zepeda*'s hesitancy to approach such a delicate issue ahead of the legislature and have held that wrongful life claims are inactionable in the state absent a statute authorizing them. *See, e.g.*, James G. v. Caserta, 332 S.E.2d 872, 881 (W. Va. 1985).

21. *See, e.g.*, Kassama v. Magat, 792 A.2d 1102, 1118, 1123-24 (Md. 2002) (refusing to recognize a wrongful life cause of action and holding that "[*Gleitman*'s] core problem, with its several offshoots, has plagued all of the courts that have had to deal with the issue").

22. Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978). The court described the possible ramifications of allowing the cause of action as "staggering." *See id.*

case *Curlender* ex rel. *Curlender v. Bio-Science Laboratories*.[23] Dealing with an issue of first impression in California, the court evaluated the claim of a child plaintiff born with Tay-Sachs disease against the genetic testing facility and physician her mother had consulted to determine the parents' status as carriers of the disease prior to conceiving a child.[24] The plaintiff's complaint alleged that the defendants' negligence had caused her parents to receive incorrect information, resulting in her birth and a shortened, disabled life.[25] The court acknowledged the difficulties previous courts had recognized as reasons for denying the cause of action, but concluded that "[i]t is neither necessary nor just to retreat into meditation on the mysteries of life," as previous courts had done.[26] The court avoided the issue of measuring disabled existence versus nonexistence and refused to interpret wrongful life as asserting a right not to be born.[27] Instead, the court granted damages for only "the pain and suffering to be endured during the limited life span available to such a child and any special pecuniary loss resulting from the impaired condition."[28]

In a subsequent case, *Turpin v. Sortini*, the California Supreme Court sitting en banc reaffirmed the availability of a cause of action for wrongful life but modified the *Curlender* holding.[29] *Turpin* criticized *Curlender* for glossing over the difficulty in establishing injury by focusing only on the plaintiff's condition after birth.[30] The court

23. 165 Cal. Rptr. 477 (Cal. Ct. App. 1980), *abrogated by* Turpin v. Sortini, 643 P.2d 954 (Cal. 1982).

24. *See id.* at 480.

25. *Id.*

26. *See id.* at 488. The court reasoned that "[t]he reality of the 'wrongful-life' concept is that such a plaintiff both *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.*

27. *See id.* at 489.

28. *Id.* In one sense, the California rule awards expansive recovery, as it calculates damages for the entire duration of the child's life. It awards conceptually limited relief, however, in that it restricts the set of compensable harms to the child's pain, suffering, and medical expenses, as opposed to compensating the child's very existence. *Cf. supra* notes 19-20 and accompanying text.

29. *See* 643 P.2d 954 (Cal. 1982).

30. *Turpin* held that *Curlender* "ignores the essential nature of the defendants' alleged wrong.... [T]he obvious tragic fact is that plaintiff never had a chance 'to be born as a whole, functional human being without total deafness'; if defendants had performed their jobs properly, she ... would not have been born at all." *Id.* at 961.

held that a plaintiff may not recover general damages for being born disabled rather than not being born at all.[31] Instead, he may recover special damages equal to the "extraordinary expenses" required for treatment.[32] The court found traditional rationales persuasive enough to reject general damages,[33] but held that the financial burden on the plaintiff's family and the ability to measure special damages without difficulty justified recovery.[34]

The remaining jurisdictions that recognize wrongful life causes of action—Maine, New Jersey, and Washington—have adopted largely similar rules as California, permitting recovery of specific damages based upon the extraordinary medical expenses accompanying the plaintiff's disabled state.[35] However, these states do not allow recovery of general damages based upon defining the plaintiff's very life as an injury, an inquiry which they recognize exceeds judicial capacity.[36] In the words of *Procanik*, "We need not become preoccupied ... with these metaphysical considerations."[37] Many subsequent courts in jurisdictions that do not recognize wrongful life have found the distinctions these jurisdictions draw less than persuasive.[38]

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31. *Id.* at 966.

32. *Id.*

33. *See id.* at 963.

34. *See id.* at 965-66.

35. *See* ME. REV. STAT. ANN. tit. 24, § 2931(3) (2015) ("Damages for the birth of an unhealthy child born as the result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child."); Procanik *ex rel.* Procanik v. Cillo, 478 A.2d 755, 763 (N.J. 1984) ("Our decision to allow the recovery of extraordinary medical expenses is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living."); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496 (Wash. 1983) ("[O]ne of the consequences of the birth of the child who claims wrongful life is the incurring of extraordinary expenses for medical care and special training. These expenses are calculable.").

36. *See, e.g.*, ME. REV. STAT. ANN. tit. 24, § 2931(3) ("Damages … shall be limited to damages associated with *disease, defect or handicap*.") (emphasis added); *Procanik*, 478 A.2d at 760 ("[P]olicy considerations have led this Court in the past to decline to recognize any cause of action in an infant for his wrongful life. The threshold problem had been the assertion by infant plaintiffs not that they should have been born without defects, but that they should not have been born at all."); *Harbeson*, 656 P.2d at 492 ("The real question as to injury, therefore, is not the existence of the injury, but the extent of that injury. In other words, having recognized that the birth of the child represents an injury, how do we measure damages?").

37. *Procanik*, 478 A.2d at 763.

38. *See, e.g.*, Lininger *ex rel.* Lininger v. Eisenbaum, 764 P.2d 1202, 1212 (Colo. 1988) ("We ... conclude that the Washington Supreme Court, as did the Supreme Courts of California and New Jersey, chose to disregard the child's failure to prove an injury in light of its perception that the equities of permitting the child to recover special damages were entitled to greater

II. INADEQUACY OF RECENT ATTEMPTS TO JUSTIFY RECOGNIZING WRONGFUL LIFE

Notwithstanding the persistent conceptual difficulties inherent in wrongful life that courts denying or allowing recovery recognize, recent literature shows a growing trend in favor of allowing the cause of action, or broadening recovery in jurisdictions that already allow it in a limited way. This Part examines these various attempts, focusing on putative justifications of wrongful life based on principles of negligence, contract, and strict liability. It concludes that wrongful life does not fit coherently into any of these conceptual frameworks because they all fail to adequately describe the legally compensable injury without defining the injury as the plaintiff's very existence.

A. The Traditional Negligence Framework

As discussed above, courts have typically interpreted wrongful life claims as sounding in negligence, effectively a highly specialized medical malpractice claim.[39] The difficulty of describing wrongful life as a negligence claim, particularly with respect to the elements of causation and damages, accounts for the hesitancy to grant recovery and the limited nature of any recovery that occurs.[40]

It is important at the outset to distinguish wrongful life from several other torts involving conception. Wrongful life is distinguished from a standard prenatal tort claim[41] in that the physician does not cause an otherwise healthy child to be born with an injury. Rather, in wrongful life, the child had no chance of being born without the defect, and the physician simply deprived the mother of the

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weight."); Smith v. Cote, 513 A.2d 341, 354 (N.H. 1986) ("The essence of the *Turpin* rule is that logic should not defeat the claim of a severely impaired child in need of help.").

39. *See supra* Part I.

40. *See supra* notes 12, 27.

41. *See* Roland F. Chase, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222, § 2[b] (1971) ("The law is now clear in virtually all American jurisdictions that have ruled on the question—a tort action can be maintained to recover damages for prenatal injuries negligently inflicted, if the injured child is born alive.").

opportunity to abort.[42] Additionally, wrongful life differs from wrongful birth in that the child brings the claim in the former whereas in the latter, the parents bring the claim on their own behalf.[43] In a wrongful birth suit, the parents seek compensation for their lost ability to exercise their right to abort the child, but in wrongful life their child seeks compensation for his own injuries, allegedly caused by the parents' failure to abort. Some states recognize wrongful birth but not wrongful life as a cause of action.[44]

In arguing for broader imposition of wrongful life liability, Deana Pollard contends that the rejection of wrongful life stems from courts' improper emphasis on the compensatory function of tort law and the inability to return the plaintiff to a pre-tort state.[45] She asserts that courts focus on this compensatory function[46] to the exclusion of other fundamental goals of tort law, such as allocating loss

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42. *See* Turpin v. Sortini, 643 P.2d 954, 961 (Cal. 1982) ("In an ordinary prenatal injury case, if the defendant had not been negligent, the child would have been born healthy.... In this case, by contrast, the obvious tragic fact is that plaintiff never had a chance 'to be born as a whole, functional human being without total deafness.'").

43. *Compare, e.g.*, Geler v. Akawie, 818 A.2d 402, 411 (N.J. Super. Ct. App. Div. 2003) ("In wrongful birth cases, there is no claim that the negligence of the physician caused the child's impairments. The sole claim is that negligence precluded the parents' opportunity to decide whether to give birth to the impaired child in the first place."), *with* Ginsberg *ex rel.* Ginsberg v. Quest Diagnostics, Inc., 117 A.3d 200, 224-25 (N.J. Super. Ct. App. Div. 2015) ("Apart from wrongful birth claims by parents, New Jersey separately recognizes what are known in this state as 'wrongful life' claims, which may be brought on behalf of infants born with congenital defects.") (footnote omitted).

44. *See, e.g.*, Pizano *ex rel.* Walker v. Mart, 790 P.2d 735, 741 (Ariz. 1990); Garrison v. Med. Ctr. of Del. Inc., 581 A.2d 288, 289 (Del. 1989). Other torts can arise in contexts where the parents did not desire a pregnancy at all. For example, "wrongful conception" stems from "failed birth control, negligent provision of birth control or a negligently performed sterilization; "wrongful pregnancy" assumes the negligent act occurred after pregnancy and may result from a negligent failure to timely identify a pregnancy or a negligently performed abortion. *See* Ralph R. Frasca, *Negligent Beginnings: Damages in Wrongful Conception, Wrongful Birth and Wrongful Life*, 19 J. FORENSIC ECON. 185, 186 (2006). These torts, like wrongful birth, differ from wrongful life in that the parents, not the child, allege legal harm. *See id.* at 185.

45. *See* Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 331-32 (2004). Pollard attributes this persistent emphasis to the influence of the *Gleitman* analysis. *Id.*

46. *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979) ("While the law of contracts gives to a party to a contract as damages for its breach an amount equal to the benefit he would have received had the contract been performed, the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.") (internal citation omitted).

to those who cause harm, cost-spreading, and punishing and deterring wrongful conduct.[47] Pollard contends that tort law is moving toward these broader goals and "away from denying recovery based on a technical application of elements required to state a cause of action at common law," thus doing away with the traditional reasons for refusing to recognize wrongful life.[48]

Pollard nonetheless attempts to justify wrongful life within the elements of a standard negligence claim. She contends that a plaintiff can easily establish the physician as the cause of the injury.[49] The mother's testimony that she would have had an abortion absent the physician's mistake proves but-for causation.[50] Because the element of proximate causation limits a defendant's liability to foreseeable harms sustained by foreseeable plaintiffs, and because the manifestation of a birth defect upon the birth of a child that the physician examined in utero is a foreseeable harm (given a failure to diagnose a defect), the plaintiff can establish proximate causation.[51]

Pollard's causation analysis, however, glosses over several serious issues. First, in any given wrongful life case, it is not necessarily clear that the child would not have existed but for the physician's negligence. In conceivable scenarios, a physician could comply completely with the standard of care and diagnose a birth defect, but the parents could choose not to abort. The child would then exist absent any negligence. This presents an evidentiary problem: proving causation in fact requires the testimony of the mother, a highly interested party, as to a highly subjective, counterfactual course of action.

Second, and more importantly, Pollard ignores a central premise of wrongful life: namely, that nothing the physician did could have

47. *See* Pollard, *supra* note 45, at 336.

48. *Id.* at 341-42; *see also* Francis Sohn, Note, *Products Liability and the Fertility Industry: Overcoming Some Problems in "Wrongful Life"*, 44 CORNELL INT'L L.J. 145, 162-63 (2011). Sohn argues that limiting recovery because of the difficulty of returning a plaintiff to her pre-tort condition is an "extremely narrow view of the function of damages in tort." *Id.* Instead, courts should "do substantial justice to the victims of wrongful life" and measure damages according to the pain and suffering that the negligent genetic counselor caused. *Id.* at 163.

49. *See* Pollard, *supra* note 45, at 344.

50. *See id.*

51. *See id.*

treated or prevented the pre-existing genetic defect.[52] If the physician could not have cured the defect, then in a real sense, he is not the but-for cause of the defect; the plaintiff's genetic makeup is. Put differently, the physician caused the child's existence, while the child's genetic predisposition caused the impaired state. Of course, this objection to Pollard collapses if courts describe the injury as the child's birth instead of the genetic defect. However, doing so reintroduces the difficulties courts have encountered in treating a child's very life as an injury, the same issues Pollard attempts to eliminate.

The Restatement (Third) of Torts provides that "[w]hen damages for an injury can be divided by causation, the factfinder first divides them into their indivisible component parts and separately apportions liability for each indivisible component."[53] A factfinder can apportion damages according to causation when there exists reasonable evidence to determine (1) that a negligent party's conduct "was a legal cause of less than the entire damages," and (2) "the amount of damages separately caused by *that conduct*."[54]

The courts that currently award special damages for wrongful life attempt to apportion damages in this way: they conclude that the physician was the legal cause of less than the entire damages (the suffering caused by the birth defect, not the plaintiff's entire existence), and that the damages are calculable.[55] However, in doing so, they adopt a mix-and-match approach to apportionment and hold the physician liable for the harm that genetics caused.[56] Classifying the injury as indivisible might fit more neatly within existing tort doctrine, but would force courts to consider the plaintiff's entire life, both defect and existence, as the harm—the result they have attempted to avoid.

Pollard also fails to provide a description of damages that comport with existing tort doctrine. She contends that in light of the expand-

52. This is contrasted with a prebirth tort claim, where the physician does cause the injury. *See generally supra* notes 41-44.

53. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26(a) (2000).

54. *Id.* § 26(b) (emphasis added).

55. *See, e.g.*, Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496 (Wash. 1983) ("General damages are certainly beyond computation.... But one of the consequences of the birth of the child who claims wrongful life is the incurring of extraordinary expenses for medical care and special training. These expenses are calculable.").

56. *See, e.g.*, *id.* at 496-97.

ed goals of contemporary tort law, a plaintiff should not have to prove damages beyond the medical and other extraordinary expenses the minority jurisdictions already award.[57] Even if courts require something more than medical expenses, a wrongful life plaintiff has compensable injuries in pain and suffering, lost chance for medical intervention, and interference with a due process liberty interest.[58] None of these purported harms provide a satisfactory measure of damages. As discussed above, measuring damages by expenses alone separates the cause and harm. Pain and suffering would be bound up too closely with the subjective value placed on life. Lost chance for medical intervention presupposes that the physician could have improved the child's chance of a healthy life with a proper diagnosis, but this is not a standard wrongful life claim and could be easily redressed with a standard prenatal tort claim.

Lastly, Pollard attempts to circumvent the problem of defining the compensable injury by casting the injury as a violation of a right.[59] Other supporters of wrongful life have gone so far as to hold that the parents, not just their physician, commit a moral harm, or violate a right, by knowingly bringing into existence a disabled child.[60] Part III will discuss the fatal issues that arise through parsing the injury as a rights violation.

In sum, traditional negligence doctrine seems ill-suited to handle the peculiarities of wrongful life. A court must either separate the harm from its cause or consider the plaintiff's very existence as an injury, both of which are undesirable.

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57. *See* Pollard, *supra* note 45, at 352.

58. *See id.*

59. Pollard argues that in some cases "the fetus's best interests are served and her right to avoid suffering is most effectively advanced by terminating her life prior to birth.... [T]he child's right to avoid suffering should be recognized, and infringement of that right should constitute injury." *Id.* at 360-61 (footnote omitted).

60. *See, e.g.*, David Archard, *Wrongful Life*, 79 PHIL. 403, 420 (2004) (arguing that parents do wrong in "knowingly bringing into existence a child" deprived of "a good number of those rights that are listed in the United Nations Convention on the Rights of the Child"). For a recent iteration of this argument in the public sphere, and the response from disability rights groups, see, for example, *Richard Dawkins Apologises for Causing Storm with Down's Syndrome Tweet*, GUARDIAN (Aug. 21, 2014, 12:13 PM), http://www.theguardian.com/science/2014/aug/21/richard-dawkins-apologises-downs-syndrome-tweet [https://perma.cc/HZ4L-M9F2].

B. Contract-based Justifications

Professor Ronen Perry contends that the conceptual incongruence between wrongful life and tort law, not any convincing policy considerations, explains the widespread refusal to recognize wrongful life.[61] He offers a contract-based conceptual framework for wrongful life claims, arguing that "since the Gordian knot of tort law cannot be untied, it must be cut altogether."[62] Perry's view is that a wrongful life claim becomes a claim for breach of a warranty by the physician, that the parents would give birth to a healthy child, with the child plaintiff able to recover as a third-party beneficiary of the implied contract.[63] Perry supports expectancy damages that place the plaintiff as close as possible to the position the physician warranted, namely, a life free of defect.[64]

Perry contends that a contract framework dispenses with many of the problems inherent in a tort-based wrongful life claim.[65] Awarding damages necessary to place the plaintiff in the position the defendant warranted avoids forcing courts to make impossible comparisons between existence and nonexistence, and does not risk judicial value judgments that might offend the disabled.[66] Additionally, Perry alleges, measuring damages in this way does not require parents to testify to what they would have done if they had different information and does not force courts to discriminate between those disabilities that are worth compensating and those that are not: any child in a condition different from that which the defendant warranted can recover.[67] No court has embraced this approach to date.

Perry's formulation probably has the greatest intuitive force of all the justifications for wrongful life, but regardless, a contract-based approach has conceptual issues that prevent it from making wrong-

61. *See* Ronen Perry, *It's a Wonderful Life*, 93 CORNELL L. REV. 329, 381 (2008). Perry agrees with the majority's reasoning that the harm in a tort-based wrongful life suit is logically self-defeating, and courts are not equipped to make the impossible comparison between disabled life and nonexistence. *See id.* at 361-62.

62. *Id.* at 398.

63. *See id.*

64. *See id.* at 396.

65. *See id.*

66. *See id.* For a discussion of the effects of wrongful life on the societal view of the disabled, see *infra* Part III.A.

67. *See* Perry, *supra* note 61, at 396.

ful life completely coherent. Perry distinguishes between two types of wrongful life cases: one in which the plaintiff's parents received faulty genetic counseling and relied upon it in choosing to conceive, and one in which the parents had conceived before counseling and relied upon the incorrect information in choosing to bring the pregnancy to term.[68] Perry admits that his framework cannot apply to the first case, because the defendant did not promise that the child would be healthy, but rather that no child would be conceived at all.[69] Placing the plaintiff in the position warranted would thus require compensating the plaintiff's entire existence, the same problem that led to the rejection of tort-based claims.

The problem is that this same conclusion also follows in the second variety of wrongful life claims that Perry identifies. Perry argues that it does not, because in such cases the defendant promises the parents that they will give birth to a healthy child.[70] Accordingly, the measure of damages would place the child in the situation warranted—namely, a healthy existence.[71]

However, Perry's analysis errs in construing the warranty as a promise that the parents will have a healthy child. Parents do not pay genetic counselors to tell them they will bear a healthy child, however much they hope that is what they will hear. Rather, parents pay for correct results of genetic tests, for good or ill, upon which they can base decisions. Thus, the genetic counselor does not necessarily warrant that the parents will have a healthy child, but rather that he provided an accurate prognosis about the child's likelihood of disability. In fact, no physician can categorically promise that a child will be healthy. Thus, Perry's theory depends upon an implied warranty of an outcome that no physician has the power to warrant.

Making a contract theory practicable would require construing the physician's implied warranty as a promise that the parents would receive correct information about their child's likelihood of disability. Expectancy damages upon breach would then seek to put the plaintiff in the warranted position: having an accurate progno-

68. *See id.* at 396-97.
69. *See id.*
70. *See id.*
71. *See id.* at 394-95.

sis. But this would bring the analysis right back to the conclusion that cripples a tort-based analysis: the plaintiff's parents would have to testify that had they received the correct information as warranted, they would have chosen abortion. The child's very existence once again becomes the injury requiring compensation.

Additionally, Perry's suggested framework imposes an even higher burden on physicians than tort law. He acknowledges that the state of scientific and technological progress, inherent uncertainty in some medical tests, and human analysis can limit the accuracy of genetic tests in ways beyond the physician's control.[72] Perry argues that a disclaimer of these limits to the parents qualifies the warranty and absolves the defendant of any defects resulting from these errors, whereas a physician who fails to make this disclaimer "implicitly assures the parents of the accuracy of the representation," even when errors result from unavoidable limits in science.[73] Under tort law, a physician need only comply with the standard of a reasonable practitioner, subject to the inherent limits in medicine.[74] Under Perry's framework, a physician must not only comply with the reasonable standard of care, but must disclose its limitations to the prospective parents. Implying a warranty that requires disclaimer of any error resulting from forces beyond the physician's control would create a large extension of the duties of physicians who practice in the genetic counseling field.

C. Strict Liability Justifications

Like Perry, Alan Belsky accepts that a negligence-based scheme for wrongful life requires a comparison between disabled existence and nonexistence, a "[m]etaphysical [c]onundrum" that courts are ill-equipped to solve.[75] Accordingly, Belsky advocates an alternative approach using tort principles of strict products liability as a model.[76]

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72. *See id.* at 388.

73. *See id.*

74. *See* RESTATEMENT (SECOND) OF TORTS § 299A cmts. b, e (1965).

75. Alan J. Belsky, *Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?*, 22 U. BALT. L. REV. 185, 222 (1993).

76. *See id.* at 248.

Belsky defines strict liability as "liability without fault," or "liability imposed merely because an act was committed without regard to the level of care exercised by the defendant in seeking to avoid the risk of harm to others."[77] Under this framework, a genetic counselor in a wrongful life case breaches a duty of care and provides a defective product (erroneous counseling) to the plaintiff's parents, which causes harm to the plaintiff.[78]

Belsky asserts that this approach has several advantages. First, it completely circumvents the difficult issues involved in proving negligence and provides an economic incentive to the genetic counselor by assigning costs to him, as the counselor is the one best able to avoid harms and the one who derives economic benefit from the counseling.[79] Second, a strict liability framework does not require the plaintiff to assert his existence as a compensable injury, thus "reliev[ing] the courts of the unnecessary metaphysical considerations they contend prevent any monetary award for wrongful life."[80] Belsky contends that "[r]elieving wrongful life plaintiffs of their burden of proving injury to a philosophical certainty will encourage early settlement of legitimate claims since the defendant no longer will have the issue of injury on which to hang her hat."[81]

Belsky's argument leaves questions: the whole point behind courts' finding claims "illegitimate" has been plaintiffs' inability to establish injury, but Belsky advocates the strict liability framework to allow recovery on otherwise "legitimate" claims. He offers no explanation for why those claims are legitimate, other than the fact that the counselor deviated from a given standard of care and requires an incentive to avoid such behavior in the future.[82] However, Belsky offers no convincing reason why the incentive should come in the form of paying damages to the disabled child—who has not established an injury—as opposed to other incentives,

77. *Id.* at 249.

78. *See id.* at 251-52.

79. *See id.* at 254-58.

80. *Id.* at 248.

81. *Id.* at 263.

82. Indeed, his rationales are nearly purely economic: liability is justified because the genetic counselor requires an economic incentive to act prudently and is the best accident avoider, the best risk allocator, and a participant in a market with a duty to consumers. *See id.* at 254-58.

such as fines or professional discipline. And in limiting his rationales to economics, Belsky ignores broader-reaching, noneconomic harms inherent in wrongful life.[83]

Nor does a strict liability approach solve the problems inherent in the traditional negligence-based wrongful life claim. Belsky recognizes that his framework does not deal with the issue of damages, but nevertheless argues in favor of awarding nonpecuniary pain and suffering damages because they are calculable.[84] Strangely, though, strict products liability causes of action, which Belsky uses as his analogy, require a showing of resultant damages.[85] The Restatement (Third) of Torts recalls that strict liability for defective products arose in the 1960s because of conceptual difficulties in describing such cases according to traditional negligence principles; courts perceived policy rationales for compensating plaintiff's injuries, so they began finding liability even when plaintiffs could not prove fault.[86]

Belsky argues for a similar expansion of doctrine for policy reasons, but he stands the strict liability rationale on its head. Instead of dispensing with the element of fault in favor of harm, Belsky dispenses with harm in favor of fault. Perhaps strict liability allows a claim against a genuinely negligent defendant and avoids the issue of proving causation that has plagued the negligence framework, but it gets no closer to providing a compelling account of injury.

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83. *See infra* Part III.

84. *See* Belsky, *supra* note 75, at 266. Francis Sohn advocates a similar products liability-based approach to wrongful life in the context of fertility clinics, based on the idea that donated sperm is a "defective product" when it causes genetic disabilities to the resulting child, and that the fertility clinic is liable as the supplier of this product. *See* Sohn, *supra* note 48, at 173-74. Although quite clever, his solution would have limited use outside the context of fertility clinics or assisted reproduction. Furthermore, it suffers from the same inadequacies as Belsky's theory in that it does not measure damages in a way that avoids the standard conceptual issues courts have encountered.

85. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for *harm to persons or property caused by the defect*.") (emphasis added).

86. *See id.* at cmt. a ("American courts began to recognize that a commercial seller ... should be liable in tort for harm caused by the defect regardless of the plaintiff's ability to maintain a traditional negligence or warranty action. Liability attached even if the manufacturer's quality control in producing the defective product was reasonable.").

III. INSURMOUNTABLE PROBLEMS WITH WRONGFUL LIFE

It appears, then, that none of the proffered defenses of, nor justifications for, allowing wrongful life recovery succeed in solving the conceptual problems historically associated with the cause of action—specifically, attributing causation to the physician's negligent conduct and measuring damages.[87] Wrongful life does not fit squarely within the existing doctrines of negligence, contract, or strict liability.[88] However, the law has often bent existing doctrines, so to speak, in order to accomplish certain societal goals and make recovery available in a desired context.[89] Mere conceptual incongruity on its own cannot, therefore, justify the denial of wrongful life recovery, particularly in the face of societal goals that defenders of wrongful life liability contend justify the cause of action.

Many proponents of wrongful life appeal to the tort goals of cost-spreading and deterrence of negligent or wrongful conduct by physicians as rationales for allowing recovery, regardless of the conceptual difficulties wrongful life entails.[90] Frasca writes that birth-related torts, or "negligent beginnings is a unique area of the law where deterrence, rather than victim compensation, is the driving force for damages," based on judicial recognition that "without damages there can be no deterrence."[91] Belsky, for example, contends that because physicians carry medical malpractice insurance, they can bear the costs of a child's disability better than the child's family.[92] Furthermore, denying recovery because of the inability to measure injury to "philosophical certainty" gives clearly

87. *See supra* Part I.

88. *See supra* Part II.

89. For example, acting out of a desire to impose liability without fault upon manufacturers, courts created the doctrine of strict liability in tort for defective products by combining elements of negligence from tort law with the concept of implied warranty from contract law. *See* RESTATEMENT (THIRD) OF TORTS § 1 cmt. a (1998). Similarly, in wrongful death actions stemming from car accidents and other fatal injuries, courts have extended recovery to compensate a decedent's estate for the defendant's emotional distress and dread because of his apprehension of imminent death before the fatal physical impact. Beynon v. Montgomery Cablevision Ltd. P'ship, 718 A.2d 1161 (1998) (allowing recovery for pre-impact fright as a matter of first impression).

90. *See* Pollard, *supra* note 45, at 337.

91. Frasca, *supra* note 44, at 199.

92. *See* Belsky, *supra* note 75, at 256-57.

negligent physicians a windfall, and does not incentivize proper provision of care or encourage settlement.[93]

A similar argument from opponents of wrongful life contends that imposing liability upon physicians for failure to advise of potential birth defects would overincentivize prenatal screening.[94] The possibility of a wrongful life suit would put pressure on physicians to practice "defensive medicine" and "advise prenatal screening and abortion" in close cases, leading to "the over-kill of normal, healthy children."[95] However, both sides might overstate the case for deterrence; research has suggested that increased medical malpractice liability has no real impact on the practice of medicine, much less any overdeterrent effect.[96]

This conclusion appears to apply strongly to the field of obstetrics. Studies have found no systematic improvement in healthcare outcomes when obstetricians face a higher threat of malpractice liability.[97] Nor does an obstetrician's history of being sued for malpractice affect subsequent quality of practice.[98] Most relevant to wrongful life liability, a study of obstetricians suggested there is no correlation between experience with or exposure to malpractice liability and increased use of prenatal resources such as ultrasound, referrals to specialists, and various precautionary tests.[99] Physicians' assessments of the medical necessity of tests, not fear of liability, determined usage.[100] Most tellingly, this study focused on obstetricians in Washington twelve years after the state first allowed recovery for wrongful life.[101]

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93. *See id.* at 262-63.

94. James Bopp, Jr. et al., *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 DUQ. L. REV. 461, 514-15 (1989).

95. *See id.*

96. *See* Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1606 (2002) (citing a review by the Office of Technology Studies of the U.S. Congress).

97. *See* Frank A. Sloan et al., *Effects of the Threat of Medical Malpractice Litigation and Other Factors on Birth Outcomes*, 33 MED. CARE 700, 710-11 (1995).

98. *See* Stephen S. Entman et al., *The Relationship Between Malpractice Claims History and Subsequent Obstetric Care*, 272 JAMA 1588, 1590 (1994).

99. Laura-Mae Baldwin et al., *Defensive Medicine and Obstetrics*, 274 JAMA 1606, 1606, 1609 (1995).

100. *See id.*

101. *Compare id.*, *with* Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 483 (Wash. 1983).

Deterrence, therefore, appears an unsatisfying basis for ignoring the conceptual difficulties inherent in wrongful life claims. Although the desire to spread costs has some intuitive force, particularly in light of its prominent place in contemporary tort law, it must outweigh significant harmful ramifications that broader recognition of wrongful life claims will have, particularly requiring courts to make valuations on human life and creating incongruity with *Roe v. Wade*.

A. Wrongful Life Claims Require Judicial Valuation of Individual Lives

As discussed in Part II, a majority of courts have denied recovery for wrongful life to avoid making uncomfortable comparisons between existing in a disabled state and not existing at all, which would seem to conflict with the notion of the intrinsic value of life. Proponents of wrongful life have criticized this position in light of the fact that the value of life has become increasingly relative.[102] Perry contends that courts cannot objectively determine the value of life, which remains a mystery, and that "[t]he argument that life is always preferable to nonexistence is necessarily subjective, value laden, and rooted in personal beliefs (moral, religious, or other). It is not an objective argument based on a scientific examination of reality."[103] Furthermore, the legality of abortion, euthanasia, and the right to refuse life-sustaining medical treatment suggest, not necessarily that nonexistence is categorically superior to disability, but that the value of life is relative.[104] Thus, courts cannot justify rejecting wrongful life claims on the basis of any alleged inherent sanctity or value of life alone.[105]

Many proponents of wrongful life have pointed to "right to die" jurisprudence as showing the relative nature of the sanctity of life, thereby undermining traditional justifications for denying the cause

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102. *See* John Harris, *The Wrong of Wrongful Life*, 17 J.L. & SOC'Y 90, 101 (1990) ("Concerning children or adults in being who can have a view about the worthwhile nature of existence, the question can surely only be answered subjectively. A condition is worse than non-existence if and only if the subject would rather not exist than exist in such a condition.").

103. Perry, *supra* note 61, at 369.

104. *See id.* at 368.

105. *See id.*

of action.[106] If courts can recognize the right of a terminally ill individual to decide to refuse life-prolonging treatment, the argument goes, the law thus vindicates the position that nonexistence can be preferable to existence in a disabled state.[107]

In addition to supporting the relative value of life, some supporters of wrongful life have sought to use "right to die" jurisprudence more substantively to establish harm.[108] Pollard, for example, contends that a physician who causes the birth of a child in a severely defective state—terminally ill and in constant pain—commits a violation of the child's due process right of freedom that warrants redress through the wrongful life cause of action.[109]

Those who use "right to die" cases to argue for the recognition of wrongful life ignore several key idiosyncrasies of those cases that limit their relevance to a wrongful life context. First, in "right to die" cases, the injury complained of is the violation of an individual liberty interest caused by unwanted medical treatment, prolonging a life of suffering.[110] In other words, the harm in "right to die" cases is life itself, the very conceptual scheme wrongful life seeks to avoid. The basis of "right to die" cases is not any determination by the court that nonexistence can be better than existence; the state may in fact adhere to a baseline view that life is categorically valuable but simply must recognize that individuals may conclude otherwise on their own and reject treatment based on the liberty interest in bodily integrity.[111]

Casting life as an injury in "right to die" situations arguably works in a way that cannot apply in wrongful life cases. When an

106. *See, e.g.*, Pollard, *supra* note 45, at 359.

107. *See id.*

108. *See* I. Giesen, *Of Wrongful Birth, Wrongful Life, Comparative Law and the Politics of Tort Law Systems*, 72 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG. [THRHR] 257, 268 (2009) (S. Afr.) (arguing that wrongful life actions at heart vindicate the right to self-determination, exercised by parents on behalf of the child).

109. Pollard, *supra* note 45, at 372.

110. *See* Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990) (holding that the logic of due process cases suggests that the "forced administration of life-sustaining medical treatment" implicates a liberty interest and the patient's right to refuse).

111. *See id.* at 282 ("Finally, we think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."); *see also id.* at 281 ("The choice between life and death is a deeply personal decision of obvious and overwhelming finality.").

individual receives life-sustaining medical treatment in violation of his wish to die, a court may vindicate his liberty interest by recognizing his ability to determine the value of his own life without having to evaluate that individual determination. The court need only cast the unwanted treatment as a battery that the individual may validly reject. In contrast, courts addressing wrongful life have no alternative available framework, such as battery, that would allow them to resolve wrongful life cases without approaching the issue of the value of human life. Rather, wrongful life requires courts to weigh, evaluate, and vindicate an individual determination of the value of life. The preference for judicial agnosticism with regard to individual valuation of life in "right to die" jurisprudence thus does not support, but rather militates against, allowing wrongful life liability.

A notable similarity exists between "right to die" and wrongful life suits that makes the plaintiff's case difficult in both: each allegedly hinges on a highly subjective, particularized judgment as to the value an individual places on his existence, but in both situations, the individual cannot express this judgment. A plaintiff seeking the removal of life-sustaining medical treatment often cannot express this desire because of a medical condition, and wrongful life plaintiffs are usually too young, too impaired, or both to articulate their preferences. Courts in both cases have turned to the substituted judgments of parents or family to approximate the plaintiff's wishes.[112]

However, courts have expressed doubts about the adequacy of substituted judgment in the "right to die" context. For example, the *Cruzan* court upheld a Missouri requirement for clear and convincing evidence of the patient's desire before removal of life support.[113] The court expressed concerns about whether family members' substituted judgment always accurately captures the plaintiff's wishes, noting that loved ones likely have their own strong feelings about the best result for the patient, which may differ from what the patient, if competent, would want.[114] The Court ultimately concluded that it did "not think the Due Process Clause requires the State to

112. *See, e.g.*, *id.*; Turpin v. Sortini, 643 P.2d 954, 962 (Cal. 1982).
113. *Cruzan*, 497 U.S. at 285.
114. *See id.* at 286.

repose judgment on these matters with anyone but the patient herself."[115]

Similar difficulties can arise in wrongful life. Proponents usually assert that an incompetent plaintiff's parents are in the best position to choose between life and nonlife on behalf of their child—and to vindicate their choice in the courtroom—but admit that determining the subjective will and quality of life of a fetus or severely defective child can be difficult.[116] Belsky admits that parental decisions can deviate so far from the child's best interests as to become "negligent or even reckless."[117] If the valuation at issue in wrongful life suits is truly subjective and personal, like the interest asserted in "right to die" cases, it becomes doubtful that parents, much less courts, can ascertain the will of the child with sufficient certainty to justify granting recovery. The fact that these cases, like *Cruzan*, depend upon the involvement of family members who likely have their own interests compounds this difficulty.

This familial involvement takes a robust form in wrongful life cases through the requirement that the child's mother, by all means a biased party, testify that but for the failure to diagnose the condition, she would have aborted.[118] An objector might not view the role that a mother's own preferences or interests might have in wrongful life as problematic, because a mother can have a judicially recognized interest in obtaining an abortion. However, this objection elides the important distinction between wrongful life and wrongful birth causes of action: the parents may seek compensation for their own lost right to abort through wrongful birth, but wrongful life asserts the child's interests alone.[119]

On a broader level, justifying wrongful life recovery on the basis of "right to die" jurisprudence has dangerous repercussions. Proponents of disability rights in particular have criticized wrongful life's relativization of the value of human life and its negative effects on the disabled. Wendy F. Hensel, for example, accepts that cost-

115. *Id.*

116. *See, e.g.*, Pollard, *supra* note 45, at 360.

117. *See* Belsky, *supra* note 75, at 229-30.

118. *See, e.g.*, Pollard, *supra* note 45, at 361.

119. *See supra* notes 43-44. Practically speaking, the fact that parents often bring a wrongful life claim on behalf of their child in conjunction with their own wrongful birth claim obscures the conceptual difference between the two.

spreading is a compelling justification for wrongful life at the level of the individual plaintiff, but argues that negative societal repercussions outweigh any efficiency benefits, for wrongful life grants relief only to those disabled plaintiffs "willing to openly disavow their self-worth and dignity."[120] This in turn entrenches a negative view of disability in society, because wrongful life "is akin to a state-sanctioned acknowledgement that the community of one's peers may legitimately evaluate whether an individual with impairments has a rightful place in the community and whether his functional limitations are sufficiently disruptive to warrant the preference of nonexistence."[121] For Hensel, the fact that in wrongful life cases the emphasis lies not on the negligent conduct of the physician but on the plaintiff's disability—tacitly sending negative messages about disability—is more problematic than any conceptual difficulties with wrongful life.[122]

Darpana M. Sheth goes so far as to argue that state laws allowing wrongful birth and wrongful life suits violate the Americans with Disabilities Act's prohibition on discrimination against individuals with disabilities by public entities.[123] She contends that increased training and continuing education in genetic testing, disciplinary action by state medical licensing boards against negligent genetic counselors, and federal regulation of labs that do genetic testing

120. Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 171 (2005).

121. *See id.* at 174. For Hensel, the fact that most jurors will make this inquiry from a non-disabled perspective causes particular concern. *See id.* at 185.

122. *See id.* at 144. In an empirical study, Professors Dov Fox and Christopher Griffin found plausible support for the contention that societal perceptions of disability affect potential parents' reproductive decisions. Dov Fox & Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act*, 2009 UTAH L. REV. 845, 892. Their econometric analysis showed that birthrates of children with Down syndrome decreased significantly and steadily from 1993 to 1998. *Id.* at 893. Fox and Griffin found that legal, economic, medical, and technological factors could not adequately explain this large change, and hypothesize that the Americans with Disabilities Act, "through its influence on social interaction and media coverage, reinforced negative affective attitudes toward people with disabilities in general and toward those with Down syndrome in particular," leading to an increase in abortions after Down syndrome diagnoses. *Id.* at 892.

123. *See* Darpana M. Sheth, *Better Off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans with Disabilities Act*, 73 TENN. L. REV. 641, 661-62 (2006).

would all prevent negligence without the unpalatable and illegal consequences of allowing wrongful life suits.[124]

Even beyond its harmful effects on disability, wrongful life creates dangers in that it forces courts into the business of making value judgments about human life, the exact result "right to die" jurisprudence seeks to avoid. In his dissent in *Cruzan*, Justice Brennan expressed skepticism about the legitimacy of a state interest in life independent from the value that the individual places on it, arguing that "the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment."[125] Mark Strasser presents a similar objection: What if a wrongful life suit does not necessarily make any statement about the value the plaintiff places on life *simpliciter*, but simply asserts that she would prefer never having lived at all to living in her afflicted state?[126]

Rather than resolve difficulties with wrongful life, though, these objections underscore them: even if true that the wrongful life plaintiff makes a judgment about his own life, the court must evaluate it. Regardless of how courts measure recovery—whether in tort or contract, whether granting specific or general damages—courts cannot avoid value judgments about life: which plaintiffs are in such a terrible state that they justifiably conclude they would prefer never to have lived at all, and which are in states that are not so severe as to warrant recovery. Courts would thus have to make judgments, or at least evaluate individual judgments, as to the value of life. Otherwise, anyone with the most modest defect or difficulty could sue.

To a certain extent, however, courts often make judgments about the value of human life. This occurs, for example, in cases involving life insurance policies, or in wrongful death suits in which courts calculate damages equivalent to the value of the life lost.[127]

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124. *See id.* at 665.

125. Cruzan *ex rel*. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 313 (1990) (Brennan, J., dissenting).

126. *See* Mark Strasser, *Wrongful Life, Wrongful Birth, Wrongful Death, and the Right to Refuse Treatment: Can Reasonable Jurisdictions Recognize All but One?*, 64 MO. L. REV. 29, 63-64 (1999).

127. *See* Katherine J. Santon, *The Worth of a Human Life*, 85 N.D. L. REV. 123, 128 n.17 (2009) (contrasting a $300,000 wrongful death damage award with an $8000 damage award).

However, these judicial valuations differ sharply from what wrongful life would require. In the context of measuring damages for wrongful death, courts do, in fact, attach higher monetary value to some lives than others, but for objective reasons.[128] Regardless of the specific dollar amount awarded, courts proceed on the assumption that the life of any given decedent was an affirmative good, the loss of which requires compensation. Wrongful life, by contrast, requires courts to cordon off a subset of individual lives that are not valuable goods whose loss requires restitution, but compensable harms in themselves. Wrongful life does not depend upon wrongful death's upward sliding scale of appreciating value of lives, but rather a downward sliding scale of depreciating value. Courts evaluating wrongful life suits would then have to determine the point on the scale below which life itself becomes an injury.

Contrary to the arguments of some wrongful life proponents,[129] courts cannot say that the value of life is relative or find the low point on the scale past which life has no positive value. Courts can value life only as a state interest and remain agnostic about any individual opinions that deviate from this norm. Supreme Court decisions have vindicated a state interest in preserving life, particularly in the prenatal context. In *Roe v. Wade*, the Court held that "the State does have an important and legitimate interest in preserving and protecting ... the potentiality of human life."[130] Almost two decades later, *Planned Parenthood of Southeastern Pennsylvania v. Casey* reaffirmed this interest.[131]

Proponents of wrongful life might argue that these concerns are unnecessary, because any judicial valuation of life remains linked to and motivated by the plaintiff's valuation. Pollard, for example, contends that a civil jury is the perfect "social barometer" for making value judgments in wrongful life cases.[132] Accepting this

128. *See id.*

129. *See* Pollard, *supra* note 45, at 359 (arguing the right to choose nonlife ought to be conferred on all who suffer).

130. 410 U.S. 113, 162 (1973).

131. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) ("[T]he State has legitimate interests from the outset of the pregnancy in protecting ... the life of the fetus that may become a child.").

132. *See* Pollard, *supra* note 45, at 370. She contends that "[a]nswering philosophical questions about life and death, the propriety of imposing liability in the wrongful life context, and the appropriate measure of damages are quintessential jury issues," and that juries are

argument makes a step in a dangerous direction. If courts become accustomed to making determinations about which lives are worth living, the risk grows that courts, the government in general, and the public at large—through the jury system—will make such valuations on their own.

B. Roe v. Wade *Forecloses Vindications of Rights Through Wrongful Life Claims*

In addition to appealing to the right to self-determination vindicated in the "right-to-die" context, proponents of wrongful life have pointed to theories of individual rights more broadly to justify recovery.[133] This focus parallels the arguments in foreign courts that seek to justify wrongful life causes of action by appeals to human rights laws.[134]

Writing from a philosophical perspective, law professor Aaron-Andrew P. Bruhl argues that "the person-affecting language of rights is an attractive and appropriate vehicle for understanding our relations with future individuals," including in the context of wrongful life.[135] Bruhl discusses a major obstacle for any coherent theory of the moral duties owed to future generations: the Non-Identity Problem.[136] First articulated by philosopher Derek Parfit, the Non-Identity Problem occurs because of mechanics of conception: moving the instant of potential individual X's conception even slightly means that the specific combination of genetic material comprising X would not occur, and the conception of potential individual Y might occur instead.[137] Accordingly, of two mutually exclusive moral

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best suited to differentiate between which claims deserve recovery and which do not. *See id.*

133. For example, the plaintiff in *Turpin* demanded general damages for being "deprived of the fundamental right of a child to be born as a whole, functional human being without total deafness." Turpin v. Sortini, 643 P.2d 954, 956 (Cal. 1982). The court, however, refused to grant general damages on the basis of their incalculability. *Id.* at 964.

134. *See supra* note 6. "Ms. H," the plaintiff in the South African case, contended that the focus on children's rights in the South African Constitution and Children's Act supports the recognition of a wrongful life cause of action in the common law of South Africa. *See* Sapa, *supra* note 6.

135. Aaron-Andrew P. Bruhl, Note, *Justice Unconceived: How Posterity Has Rights*, 14 YALE J.L. & HUMAN. 393, 397 (2002).

136. *See id.* at 409.

137. *See* DEREK PARFIT, REASONS AND PERSONS 377-78 (1984).

choices bearing upon future individuals, one might make the future world worse than the other would, but in doing so it makes the world worse for no one: Choice A might cause X to come to exist in a world worse than the world Choice B would bring about, but in Choice B's world, Y, not X, would exist.[138] It seems, therefore, that choosing Choice A cannot be morally wrong: although X will come to exist in a world worse than could have been otherwise, in any different world X would not exist at all.[139] The Non-Identity Problem tracks the bewilderment courts have faced when asked to award recovery for wrongful life. Even assuming *arguendo* that the physician behaved negligently, his conduct does not clearly cause a moral harm to the plaintiff sufficient to justify imposing liability. Had the plaintiff not come to exist in the disabled state, she would not exist at all, and thus she is not worse off as a result of the physician's conduct.

Bruhl contends that using rights theory to describe relations between present and future generations circumvents the Non-Identity Problem.[140] He insists that "[t]he mere fact that a person does not now exist does not mean that what we now do cannot violate his or her rights."[141] He uses the example of a manufacturer that produced a defective automobile five years ago, which results in harm to a four-year-old child today.[142] Although the child did not yet exist at the time of the car's manufacture, the negligent design causes a moral harm to the child in the same way it would an adult.[143] Similarly, a criminal who plants a bomb that goes off after thirty years, harming a fifty-year-old woman and twenty-five-year-old man violates both victims' rights to bodily autonomy in the same way, despite the fact that the man did not exist at the time the criminal planted the bomb.[144]

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138. *See id.*

139. *See id.*

140. Bruhl, *supra* note 135, at 416-17. Bruhl defines rights as an individual's entitlement that require others to behave in a certain way with respect to the individual. *See id.* at 405. Parfit, though, explicitly rejects the conclusion that rights can solve the Non-Identity Problem. PARFIT, *supra* note 137, at 366.

141. Bruhl, *supra* note 135, at 415 (emphasis omitted).

142. *See id.* at 414.

143. *See id.*

144. *See id.* at 415.

Bruhl accepts the intuitive force of the idea that one who causes another's impaired existence benefits that other person notwithstanding the impairment, but he argues that this argument misses the point of rights-based moral theory: "A right protects one or more of a person's interests or protects an *aspect* of its owner's well-being, not his overall index of welfare."[145] Limiting rights to protecting aspects of well-being, instead of protecting well-being in general, tracks the reasoning of the courts that have allowed the wrongful life cause of action and awarded damages that compensate only the aspect of the child's existence damaged by disability, not the child's existence as a whole.[146]

Although at first blush rights-based theories, like Bruhl's, for defining relations to future individuals map neatly onto wrongful life and might help courts more clearly define injury, they fail to adequately describe wrongful life cases for several reasons. First, defining rights as protecting an aspect of well-being as Bruhl does makes determining causation impossible. If each individual right protects an individual "aspect" of well-being, a putatively negligent doctor's conduct would infringe upon an "aspect" of the plaintiff's being—characterized as freedom from pain or defect; in other words, the physician violates the child's "right" to live an unimpaired life.

However, an account of the right, and therefore the compensable harm, limited in this way to a single aspect of the plaintiff, separate from his existence as a whole, requires an equally limited account of the cause of the right's violation separate from the cause of the plaintiff's existence.[147] A physician does not cause the violation of the "right" to freedom from suffering, but only causes the child's existence. Any attempt to define the harm in terms of a violation of a right therefore fails to connect the defendant's conduct to the harm. Negligence or strict liability understandings of wrongful life, which both require proof of this connection,[148] therefore fail on a rights-based view.

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145. *Id.* at 418.

146. *See supra* notes 23-37 and accompanying text.

147. This idea mirrors the required connection between causation and harm in traditional negligence doctrine. *See supra* notes 53-54 and accompanying text.

148. *See supra* Part II.A.

Second, a rights-based approach to wrongful life creates the same problems as a contract-based approach. Bruhl conceives of rights as relational, with each right creating a corresponding duty in other individuals.[149] If, then, there exists some right in an infant plaintiff, which a negligent physician violates, there exists some corresponding duty in the physician. Casting the right as the right to live free of bodily harm, or free of disability, and holding physicians liable for violations of this right, would require defining the physician's duty as a duty not to cause a child to exist in such a state. This cannot be the duty of the physician, because no doctor can guarantee a perfectly healthy child.[150] Imposing such a duty would hold a physician liable for a disabled child even absent any negligence; as discussed above, such a strict liability approach fails.[151]

And even if the doctor gave the parents all the necessary information and complied perfectly with the standard of a reasonable physician, the parents can still choose not to have an abortion and instead bring into existence a child with the alleged right violated. In such a situation, the physician's conduct was in no way wrongful, but the child still came to exist in the harmed state. Defining this state as a compensable injury would require, in the case of a non-negligent physician, an imposition of a duty on the parents—effectively a duty to abort.

Bruhl is correct that the Non-Identity Problem is not a problem in the wrongful life context,[152] but for reasons that make rights-based arguments impossible. This is because a child that has been conceived has a greater degree of metaphysical specificity than a not-yet-born person that only exists as a mental concept, and not even as a determinate individual. The key premise of the Non-Identity Problem, that any future individual can potentially not exist if conception is delayed even slightly,[153] does not apply to wrongful life cases, in which conception has occurred and an individual, or at least a potential individual as a determinate entity, exists.

149. Bruhl, *supra* note 135, at 405-06, 420.
150. *See supra* Part II.A.
151. *See supra* Part II.C.
152. *See* Bruhl, *supra* note 135, at 410-11.
153. *See supra* note 137 and accompanying text.

Bruhl's examples, then, are distinguishable from the alleged injury in wrongful life. In the cases of the defective automobile and the planted bomb, the malefactor infringes upon the right of a future, not-yet-determined individual, by altering the world such that it will cause harm to the future individual once the individual becomes determinate. In the case of wrongful life, the physician causes the already conceived, determinate child to come to exist in a disabled state, but could not cause it to exist otherwise. The perception of greater "entitativeness" in the potential child makes the Non-Identity Problem even more uncomfortable; courts cannot say the child, once born, has been harmed because the alternative is nonexistence, yet this seems unsatisfactory in light of the sense that the negligent physician's conduct harms a determinate entity.

In dismissing inquiries into measuring the difference between existence and nonexistence as metaphysical inquiries beyond judicial capability, while still permitting recovery for medical and other damages, courts do not avoid doing metaphysics; they do *bad* metaphysics and dress it up as law. Courts cannot separate a child's impaired existence from the child's existence as a whole, compensating one without the other, because rights only "vest" upon birth to the extent that, or in the manner in which, the child exists.[154] None of the proffered defenses of wrongful life escapes the conclusion that, to permit recovery, a court must cast the plaintiff's very existence as an injury. Existence, however, can never be an injury, for injury requires infringing of a right, and rights cannot rationally be predicated of that which does not exist.[155]

This explains the difference between wrongful life and Bruhl's examples. The car manufacturer and bomb planter's conduct violates the rights of their victims by causing them to exist in such-a-world; at the time of the harm, the victims are fully determinate individuals with compensable rights to exist in a world other than the one the tortfeasors caused. The physician in a wrongful life case, by contrast, causes the child to exist, not in such-a-world, but as

154. *See* Bruhl, *supra* note 135, at 427-28.

155. Bruhl, too, links rights to existence—the duty not to violate a future person's right can exist before the right vests, so to speak, at the person's birth. *See id.* at 407. He states, "neither rights nor duties have any sort of existential priority over the other." *Id.* Thus, rights only become meaningful when predicated of a person. *See id.*

such-a-thing, and the physician could not have caused the child to exist as anything else. The only alternative was to cause the child not to exist at all. To classify this as a compensable violation of a right as Bruhl suggests would require the plaintiff to have the right to exist in a state other than that in which he does—a nondisabled state.

To assert that a child plaintiff has a compensable "right" to exist in a manner other than that in which they do, when medically speaking the child could not have been born otherwise, would grant a right to exist as a healthy human person even before one is born. But this sort of predication of fetal rights is exactly what *Roe v. Wade* rejected.[156] The *Roe* Court resisted predicating any metaphysically robust notion of personhood of a fetus: "We need not resolve the difficult question of when life begins. When those trained in ... medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[157]

The Court rejected the contention that a fetus has rights that limit its mother's right to privacy: "[W]e do not agree that, by adopting one theory of life [that a fetus's life and rights begin at conception], Texas may override the rights of the pregnant woman that are at stake."[158] And although the Court recognized limits to the mother's right to obtain an abortion, the limiting principle was not any right or interest of the fetus, but rather the state's interest in preserving potential life.[159] Rather than adopt any robust theory of life, the Court made fetal viability the dividing line.[160]

Although a child's life is protected after viability,[161] it can be assumed by definition that in wrongful life contexts abortion would be feasible. Thus, the fetuses' putative right to exist as healthy human beings during the stage where abortion is permissible contradicts *Roe*. If wrongful life rests on the assumption that a right to abortion

156. *See* 410 U.S. 113, 159 (1973).

157. *Id.*

158. *Id.* at 162.

159. *See id.* at 162-63.

160. *Id.* at 163 ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb.").

161. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869-70 (1992).

exists, and, as Perry concedes, "abortion rights rest on the assumption that a fetus is not a living person,"[162] then any argument for wrongful life that predicates rights of fetuses to exist as healthy persons must fail. Presuming the feasibility of exercising the right to abortion in the wrongful life context warrants once again highlighting the difference between parents' actions for wrongful birth and the child's action for wrongful life. The rights-based arguments for wrongful life assert self-contradictory rights of the *child*, and do not invoke any right of the parents under *Roe* and *Casey* to obtain a previability abortion. Rather, the separate cause of action for wrongful birth, which goes beyond the scope of this Note, exists to vindicate any separate rights of the parents.

In sum, any cause of action alleging that an abortion should have occurred depends upon a conception of the human person and its rights that fundamentally conflicts with the right to abortion as outlined in *Roe*. But how could such a peculiar outcome arise in cases that seem to be the natural corollary to *Roe*? The *Curlender* court noted: "We deem this decision [*Roe*] to be of considerable importance in defining the parameters of 'wrongful-life' litigation."[163] A possible answer lies in *Roe*'s analysis, which separated an ontologically robust notion of rights from any grounding in an ontologically robust notion of personhood, forgetting that rights are fundamentally properties predicated on specifically existent individuals.[164] The Court unpacked the concept of "personal rights that can

162. Perry, *supra* note 61, at 369. As Pollard's analysis shows, a coherent theory of wrongful life has no choice but to reject the very assumption upon which it depends: "Since the fetus will be the *person* who will suffer from the harms that foreseeably ensue from the undisclosed birth defects, the fetus *is clearly in the class of persons* foreseeably harmed." Pollard, *supra* note 45, at 344 (emphasis added).

163. Curlender *ex rel.* Curlender v. Bio-Sci. Labs., 165 Cal. Rptr. 477, 483 (Cal. Ct. App. 1980), *abrogated by* Turpin v. Sortini, 643 P.2d 954 (1982).

164. *See supra* note 154. Although the scope of this Note does not permit a deeper discussion of this idea, as an initial suggestion, Robert Sokolowski's phenomenological vocabulary is instructive on this point. He divides the aspects of objects of intelligible speech into accidentals and essentials: accidentals are those predications that may just happen to be true of a thing, but need not be for the thing to be itself; essentials are predications true of a thing because of what it is. *See* ROBERT SOKOLOWSKI, PHENOMENOLOGY OF THE HUMAN PERSON 101, 106 (2008). He divides essentials further into properties, which flow necessarily from a thing, and essence, which underlies properties and describes what the thing actually is. *See id.* Using this terminology, a right is a property that flows from the essence of a person, one of the properties through which the idea of a "person" makes itself intelligible to a human speaker. This understanding explains Bruhl's intuitive linking of rights (properties) to existent

be deemed 'fundamental'" to the point of precluding any robust notion of personhood, the very concept from which those *personal* rights allegedly arise.[165] Absent such a link to persons, rights stop being properties and start becoming fictions, thus losing their power.[166] Wrongful life, as an extension of *Roe*, goes too far in attempting to separate compensable rights from the existence of the individuals who have them.

At the heart then, rights-based arguments in favor of wrongful life depend upon a compensable right to exist in a manner other than that in which the plaintiff does, or depend upon a right to have been aborted. Such a right cannot vest at birth, or it would be logically incoherent. And it cannot exist before birth, because this would require granting rights of a person to an abortable fetus. Therefore, this right does not exist, and the rights-based arguments fail in the face of *Roe v. Wade*.

IV. FAVORING COMPASSION OVER COURTS

Given the impossibility of fitting wrongful life neatly within any existing area of substantive law, and the negative repercussions that would result, what explains the persistence of commentary in favor of broader recognition of wrongful life? It seems that a well-intentioned compassion for the plight of the disabled plaintiff, more than any legal argument, motivates judicial recognition of wrongful life and arguments in favor thereof.[167] These motivations are noble, but in Harris's words, "the problem of disability should be seen as one of social justice," not an issue for the courts.[168]

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individuals (essences). *See supra* note 145 and accompanying text. We experience and speak of rights as properties, as predicated *of something*; without this link, rights are unintelligible.

165. *See Roe*, 410 U.S. at 152.

166. Using Sokolowski's vocabulary, our shared experience of the phenomenon of "rights" loses its intelligibility when we lose sight of its status as a property. *See* SOKOLOWSKI, *supra* note 164, at 107 ("Properties and essence come together. We would not know that certain phenomena are properties unless we also had an inkling of the essence of the thing and had begun to take the thing as one, as an instance of a kind."). Alasdair MacIntyre specifically denies that natural or human rights are properties, or "universal features of the human condition," and therefore concludes that natural rights in fact have lost their intelligibility, and have become fictions. *See* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 66-70 (2d. ed. 1984).

167. *See supra* notes 18, 29.

168. Harris, *supra* note 102, at 104.

States can address the genuine needs of disabled children without encountering the philosophical and legal difficulties that arise with attempted judicial solutions by seeking alternative methods of compensation that do not depend on the courts. Virginia and Florida have already created programs that compensate birth-related injuries without resorting to litigation: the Virginia Birth-Related Neurological Injury Compensation Program and the Florida Birth-Related Neurological Injury Compensation Association (NICA).[169] These programs operate on a no-fault model that dispenses with the need to find negligence, causation, and damages, and focuses instead on a disabled child's medical needs through administrative claims.[170] Although these two programs are "unique experiments in American personal injury law," and other states have not followed suit, they provide a model that states could potentially adopt to meet the needs of wrongful life plaintiffs.[171]

The Virginia program provides lifelong expenses and care to children born with injuries sustained due to oxygen deprivation or other injury during labor and delivery.[172] The program imposes no burden on taxpayers, because funding comes from private sources, including fees from hospitals and physicians who participate in the program and assessments of nonparticipating physicians and malpractice insurance providers within Virginia.[173]

A 2003 study by the Joint Legislative Audit and Review Commission of the Virginia General Assembly found that the program not only served more children than Virginia's capped medical malpractice tort system, but typically provided benefits in excess of those available from the courts.[174] Additionally, the report found that the

169. *See* Gil Siegal et al., *Adjudicating Severe Birth Injury Claims in Florida and Virginia: The Experience of a Landmark Experiment in Personal Injury Compensation*, 34 AM. J.L. & MED. 493, 497-99 (2008).

170. *See id.*

171. *See id.* at 533. Siegal observes that the failure of these models "to inspire replications in other states, despite widespread dissatisfaction with the current medical malpractice system, is somewhat surprising," and "likely reflects a mix of political, legal, and sociological factors" that create institutional inertia in favor of the malpractice system. *Id.* at 534.

172. *See Frequently Asked Questions*, VA. BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM, http://www.vabirthinjury.com/frequently-asked-questions/ [https://perma.cc/2A2W-6L85] (last visited Apr. 15, 2016).

173. *See id.*

174. JOINT LEGISLATIVE AUDIT AND REVIEW COMM'N OF THE VA. GEN. ASSEMBLY, REVIEW OF THE VIRGINIA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM 25 (2003)

program had a positive impact on medical malpractice insurance rates throughout the state.[175] Although the program does not currently cover injury or death resulting from genetic or congenital birth defects,[176] the general model could easily extend to cover injuries resulting from negligent genetic counseling.

The Florida legislature created the NICA program in 1988 as a response to excessively high malpractice insurance costs resulting from the tort system.[177] Based on the not-yet-enacted Virginia program, NICA "was designed to carve out the most severe of the birth-related neurologically injured patients, in part so that malpractice insurance companies would not be so fearful of doing business in a litigious Florida environment."[178]

NICA's eligibility criteria require that the child be born alive after sustaining an injury to the spinal cord or brain caused by oxygen deprivation or mechanical injury during labor, delivery, or resuscitation immediately after delivery, and that the injury cause permanent and substantial mental and physical impairment.[179] An administrative law judge determines whether an applicant meets the eligibility criteria; if so, the child can receive coverage for medical and hospital expenses, rehabilitation, therapy, custodial care, and drugs.[180] Similar to the Virginia program, NICA's funding does not come through tax revenues, but from assessments on participating physicians and hospitals.[181]

Admittedly, these programs do have their own problems. The Virginia program, for example, has suffered from financial strains.[182]

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http://www.vabirthinjury.com/wp-content/uploads/2012/08/rpt2841.pdf [https://perma.cc/6BHU-C8ZH].

175. *See id.* at 32.

176. *See id.* at 5.

177. *See* Sandy Martin, *NICA—Florida Birth-Related Neurological Injury Compensation Act: Four Reasons Why This Malpractice Reform Must Be Eliminated*, 26 NOVA L. REV. 609, 643-44 (2002); *NICA-Florida's Innovative Alternative to Costly Litigation*, FLA. BIRTH-RELATED NEUROLOGICAL INJ. COMPENSATION ASS'N [NICA], www.nica.com/what-is-nica.html [https://perma.cc/PH3V-PHFF] (last visited Apr. 15, 2016).

178. Martin, *supra* note 177, at 643.

179. *See Eligibility & Benefits*, NICA, www.nica.com/eligibility_benefits.html [https://perma.cc/U9SP-P5LW] (last visited Apr. 15, 2016).

180. *See id.*

181. *See* Randall R. Bovbjerg & Frank A. Sloan, *No-Fault for Medical Injury: Theory and Evidence*, 67 U. CIN. L. REV. 53, 93-94 (1998).

182. *See* Siegal et al., *supra* note 169, at 534.

Dr. Sandy Martin criticizes NICA for failing to achieve its goal of lowering malpractice litigation rates and points to four main defects in the program: (1) physicians dislike the funding system because it does not allow them to see the benefits of their payments to the program, (2) the program's notice requirement is unwieldy for both claimants and practitioners, (3) the program has prompted an ongoing jurisdictional struggle between the judiciary and the legislature, and (4) the eligibility definition is so narrow that claimants often end up in the tort system anyway.[183] However, these criticisms relate more to NICA's stated goal of alleviating burdens on practitioners by removing plaintiffs with cognizable claims from the courts, and could easily be resolved in a system focused on compensating children who have no cognizable legal recourse.

Regardless of the idiosyncratic difficulties that the Virginia and Florida systems have encountered, the general model is fit for adaptation to the wrongful life context; both the Virginia and Florida programs determine the appropriate level of compensation based on the child's medical needs, not any evaluation of a physician's negligence or causation.[184] As Siegal notes, "[f]rom a technical standpoint, both programs have demonstrated successful operationalization of compensation criteria that do not involve negligence, and there is much to admire about how they have accomplished this."[185] He points out that external factors, such as the conditions that lead to the programs' establishment, the quality of the medical knowledge that underlies compensation criteria, and the programs' relationship to the tort system, have as much or more to do with the programs' success as does their design.[186] Thus, firmly divorcing wrongful life from the tort system once and for all will make no-fault programs more likely to succeed, and actually achieve the aims of wrongful life causes of action.

183. *See* Martin, *supra* note 177, at 624-25.
184. *See* Siegal et al., *supra* note 169, at 497-99.
185. *Id.* at 534.
186. *See id.*

CONCLUSION

It seems that in the end, the majority of courts have adopted the correct rule in refusing to recognize wrongful life claims.[187] Proposed justifications from negligence, contract, and strict liability fail to circumvent the problem of having to define the child's very existence as an injury. Furthermore, even discarding concerns about a perfect fit with existing doctrines, any recognition of wrongful life claims requires impermissible judicial valuation of human life, and an unwieldy notion of individual rights that undermines wrongful life's foundation in *Roe v. Wade*. Those seeking a solution to the problem of disability resulting from improper genetic counseling must therefore leave the courts and look elsewhere.

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187. *See supra* Part I.

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