

THE UNEXAMINED LIFE IS NOT WORTH LIVING . . . OR IS IT? PRESERVING THE SANCTITY OF HUMAN LIFE IN AMERICAN COURTROOMS

Stephanie R. Fueger

I. INTRODUCTION

Tami Wetmore beams proudly when discussing her children, daughters Kendra, age six, and Juliana, age four. She smiles as she relays a recent bathtime story. “[Juliana] was being silly. I asked her, ‘Are you being sassy?’ She [nodded]. I asked, ‘Are you going to continue to be sassy?’ She [nodded]. I asked, ‘Do you want a knuckle sandwich?’ She shook her head yes, and . . . signed ‘tomato.’ [She wanted a] tomato with [her] knuckle sandwich!”¹

The girls are lively and animated, happy and active. Like most parents, Tami and her husband Thom are quite busy caring for their children. Their lives are full of play dates, soccer games, doctors appointments, and homework assignments. However, unlike most families, the Wetmores face obstacles incomprehensible to most on a daily basis. Little Juliana Wetmore was born missing between thirty and forty percent of the bones in her face. Referred to as the “girl without a face,” Juliana has had over twenty-one surgeries. World famous doctors and specialists have traveled to Florida, attempting to construct a face for the little girl. Through all the complex procedures and complications, Juliana has made remarkable progress since her birth in 2003.

Juliana plays soccer and communicates with her family through sign language. Her parents describe her as “incredibly intelligent” and continue to be amazed by her wit. Her father describes his little girl as a “firecracker.” Kendra calls her sister beautiful and enjoys spending time giggling and playing with her. And Tami Wetmore? Well, she is like most mothers. She wants the best for her daughter. She says, “Our ultimate goal for Juliana is for her to be happy with who she is. [We want her to] be able to achieve any goal which

1. Tami Wetmore, *Mommy’s Journal*, Juliana Wetmore: A Lot to Show the World, <http://www.julianawetmore.net> (last visited Apr. 6, 2009).

she sets for herself or any obstacles put before her [and we] have no doubt that she can.”²

While Juliana’s story is one of hope and inspiration, not all families facing similarly challenging situations are as optimistic about the future. In fact, situations like that of the Wetmore’s have increasingly resulted in litigation. Both “wrongful life” and “wrongful birth” actions have been filed in courts throughout the United States with increasing frequency. Courts are divided as to how best to approach these sensitive issues. In analyzing the strength and validity of such claims, judges are faced with agonizing decisions that often call into question moral judgments and societal beliefs. The answers to these questions are never simple, never easy. And, furthermore, they often suggest subtle, or perhaps not-so-subtle, biases and judgments.

In “The Apology,” Socrates famously proclaimed, “[the] unexamined life is not worth living.”³ Socrates bravely accepted imprisonment, even death, in support of his beliefs. He encouraged others to question authority, to thoroughly examine information rather than blindly accepting it. In Aristotle’s “*Nicomachean Ethics*,” the great philosopher embraced similar ideas.⁴ Aristotle believed that the proper role of man was in developing and cultivating his virtues, in living a life of deliberate control. According to Aristotle, society flourishes when individuals perform their functions well. While Socrates and Aristotle may surely have had sympathy for a child like Juliana, it’s doubtful that they would have believed in her ability to genuinely contribute to the world around her. No doubt such views seem appalling to many who believe in the inherent value of *all* human life. Yet, are such views at odds with the views held by judges who decide the complicated issues presented in wrongful life and wrongful birth claims? This Comment addresses that question.

This Comment argues that the ways in which the disparities between wrongful pregnancy and wrongful birth claims are handled by judges has set

2. *Id.*

3. Socrates, *Apology*, in *ANCIENT PHILOSOPHY* 88, 102 (Forrest E. Baird & Walter Kaufman eds., 2003). Socrates was imprisoned for “corrupting the minds of the youth” with new and different ideas. When his friends visited him in his jail cell, urging him to escape, he refused. He engaged them in a discussion about his motives and famously said, “And if I tell you that no greater good can happen to a man than to discuss human excellence every day and the other matters about which you have heard me arguing and examining myself and others and that an unexamined life is not worth living, then you will believe me still less. But that is so, my friends, though it is not easy to persuade you.”

4. See Aristotle, *Nicomachean Ethics*, in *SOCIAL IDEALS AND POLICIES* 112, 112-20 (Steven Luper ed., 1999). In *Nicomachean Ethics*, which is a compilation of numerous chapters, Aristotle discusses the proper organization of the political and social state. He emphasizes the importance of rigorous training, suggesting that only those who can survive such challenges are fit to contribute to the society.

up a subconscious bias against those who are born with genetic, developmental or other defects. This article proposes that the current distinctions among such claims be abolished in favor of other alternatives that actually carry out the stated goals of the judges making these decisions: respect for *all* human life. Section II of this Comment explains the differences between wrongful birth and wrongful pregnancy claims by discussing various jurisdictions' approaches to such claims. Part A of the Section briefly describes wrongful birth causes of action. Part B discusses wrongful life claims by presenting cases with holdings representing the majority and minority viewpoints as to these actions. Part C of the Comment introduces readers to wrongful pregnancy claims by identifying the four approaches currently followed by jurisdictions today. Section III contains an analysis of the differences in the ways courts handle wrongful life and wrongful pregnancy claims. This section argues that judges must abolish the distinctions between wrongful life and wrongful pregnancy claims because they ignore the benefits disabled children bestow on their parents. Further, the distinctions cannot be supported by the unprincipled, philosophical "excuses" given by judges, nor can they be supported from an economical standpoint. This Comment urges courts to adopt a new, unified framework that focuses on the tortfeasor. Section III also argues that by employing traditional negligence principles to decide these cases, judges will be able to adequately compensate wronged plaintiffs, which will, in turn, protect disabled persons. Section IV concludes by reiterating the current problems in this area of law, as well as recommending future changes to promote legitimacy and consistency in this muddled field.

II. BACKGROUND

After the landmark *Roe v. Wade* decision,⁵ the Supreme Court's commitment to the autonomy of a woman was preserved. Subsequent cases⁶ have reaffirmed the fundamental right of a woman to choose whether or not to terminate her pregnancy. As that trend has evolved, so too has the trend towards allowing recovery for wrongs related to pregnancy and childbirth. The causes of actions asserted can be separated into three different categories: wrongful life, wrongful birth, and wrongful pregnancy/conception.

5. *Roe v. Wade*, 410 U.S. 113 (1973).

6. *See* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Stenberg v. Carhart*, 530 U.S. 914 (2000), *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) (O'Connor, J., dissenting).

A. Wrongful Birth Claims

A wrongful birth cause of action is brought by the parents of a child to recover for that child having been born.⁷ These actions are brought after the birth of a developmentally challenged child.⁸ The parents' action is premised on the fact that, absent some negligence by the doctor (in most cases, failure to inform them of the possibility that their child could/would be born with particular disabilities), they would have terminated the pregnancy, and the baby never would have been born.⁹

The majority of jurisdictions recognize a wrongful life cause of action.¹⁰ In *Siemieniec v. Lutheran General Hospital*, the mother, Janice Siemieniec, pregnant with her first child, grew concerned about the possibility that her baby might be born with hemophilia because she had two cousins who suffered from the disease.¹¹ She sought genetic counseling at Lutheran General Hospital, where she told doctors that she wished to terminate her pregnancy if they determined that her baby was likely to be born with hemophilia.¹² After conducting tests, one of Janice's doctors sent her a letter stating that he believed the probability that she was a carrier of hemophilia was very low.¹³ Based on this assurance, the Siemieniec family decided to proceed with the pregnancy.¹⁴ The couple gave birth to a son, Adam, who suffered from hemophilia.¹⁵

In *Siemieniec*, the Illinois Supreme Court addressed for the first time the question of whether wrongful life was a legally cognizable claim in the state.¹⁶ In analyzing the claim, the court cited rationales advanced by other jurisdictions that recognize the claim.¹⁷ Included among these reasons was the increasing ability of doctors and medical technicians to accurately predict genetic abnormalities, society's interest in preventing these abnormalities by imposing liability on physicians and continued protection of constitutional

7. See *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 695 (Ill. 1987).

8. *Id.*

9. *Id.*

10. Michelle McEntire, Comment, *Compensating Post-Conception Prenatal Medical Malpractice While Respecting Life: A Recommendation to North Carolina Legislators*, 29 *Campbell L. Rev.* 761, 765 (2007).

11. *Siemieniec*, *supra* note 7, at 693.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 694-95.

17. *Id.* at 705.

rights in conception and procreation decisions.¹⁸ Persuaded by the reasoning of other jurisdictions, Illinois' highest court held that parents could recover for the "extraordinary expenses . . . necessary to properly manage and treat the congenital or genetic disorder . . . that will be incurred *prior* to the child's reaching his majority."¹⁹ Having decided that issue, the court turned to the other claim alleged in the Siemieniec's complaint, a wrongful life claim brought on behalf of their son, Adam.²⁰

B. Wrongful Life Claims

A wrongful life cause of action is brought by the child to recover for damages he or she must suffer for having been born with disabilities or developmental defects.²¹ A wrongful life action assumes two premises.²² First, the cause of action recognizes that the doctor or consultant being sued did not *cause* the plaintiff's disability or defect.²³ Second, wrongful life cases allege that absent the doctor's negligence, he or she would not have been born at all because conception would not have occurred or the pregnancy would have been terminated.²⁴

1. The Majority Viewpoint

The majority of courts²⁵ refuse to recognize the wrongful life cause of action, finding that "human life, no matter how burdened, is, as a matter of law, always preferable to nonlife."²⁶ In *Siemieniec*, the Illinois Supreme Court undertook a detailed analysis of existing case law regarding wrongful life claims.²⁷ The court noted that other courts' refusal to recognize wrongful life claims generally rested on one of two grounds.²⁸ First, courts were uncomfortable about allowing a child to recover damages because he or she

18. *Id.*

19. *Id.* at 706-07.

20. *Id.* at 696.

21. *Siemieniec*, *supra* note 7.

22. Ronen Perry, *It's A Wonderful Life*, 93 Cornell L. Rev. 329, 331 (2008).

23. *Id.*

24. *Id.*

25. *See, e.g.*, *Siemieniec v. Lutheran General Hospital*, 512 N.E.2d 691 (Ill. 1987), *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992), *Karlsons v. Guerinot*, 394 N.Y.S.2d 933 (4th Div. 1977), *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984).

26. *Siemieniec*, 512 N.E.2d at 697.

27. *See Id.* at 696-97.

28. *Id.* at 697.

had achieved life.²⁹ Secondly, courts failed to find an acceptable means of measuring damages in wrongful life suits.³⁰ The court pointed out that in wrongful life cases, the child bringing the action never had the chance to be born as a whole, functioning human.³¹ Calculation of damages, therefore, had to be based on the valuation of normal life versus impaired life, and the Illinois Supreme Court recognized that other jurisdictions were unwilling to undertake such complex inquiries.³² The court believed that if it recognized a wrongful life cause of action, it was also recognizing an individual's implicit interest in avoiding a life of hardship.³³ This the Illinois Supreme Court would not do. In rejecting Adam Siemieniec's wrongful life claim, the Court quoted *Becker v. Schwartz*, a New York Court of Appeals case, which had stated:

Whether it is better never to have been at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such proposition are staggering. Would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?³⁴

In *Nelson v. Krusen*, the Texas Supreme Court endorsed the majority position and denied the legal existence of a wrongful life claim in the state.³⁵ In that case, the Nelsons had already had one child who suffered from muscular dystrophy³⁶ when they learned that Mrs. Nelson was pregnant.³⁷ Mrs. Nelson consulted her doctors several times to determine whether she was a carrier of muscular dystrophy.³⁸ After being assured that she was not a

29. *Id.*

30. *Id.*

31. *Id.* at 698.

32. *Id.*

33. *Id.*

34. *Id.* (quoting *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978)).

35. *Nelson v. Krusen*, 678 S.W.2d 918, 925 (Tex. 1984).

36. Muscular dystrophy is a muscle disease in which muscle tissues become progressively weaker throughout an individual's lifetime. In the late stages of the disease, fat and connective tissue often replace muscle. There is no cure for the disease, but some medications have proven useful in slowing its progression. Mayo Clinic Staff, Diseases and Conditions, Muscular Dystrophy, <http://www.mayoclinic.com/health/muscular-dystrophy/DS00200> (last visited Apr. 7, 2009).

37. *Nelson*, 678 S.W.2d at 920.

38. *Id.*

carrier, the Nelsons decided to continue with the pregnancy.³⁹ After their son Mark was born, he was diagnosed with muscular dystrophy.⁴⁰

In reaching its decision not to recognize a wrongful life cause of action, the Texas Supreme Court discussed one of the goals of tort compensation: a damages award is supposed to put the plaintiff back in the position he would have been in absent the defendant's negligence.⁴¹ However, in wrongful life claims, this cannot be done because, as Justice Robertson wrote in his concurring opinion, "man knows nothing of nonexistence, and can assign it neither a positive nor negative value."⁴² Justice Robertson quoted the following to support the court's opinion:

When the plaintiff alleges that his own birth was wrongful, in effect he asks the court to judicially determine that he should not have been allowed to live, but when another person such as a parent alleges that the infant should not have been born, the parent does not seek to negate his own present existence. *The parent is in reality seeking damages for injuries casually related to the fact of birth, but not for the birth itself.* Thus, the parents are not placed in the anomalous position of trying to sue themselves into oblivion, as are the children.⁴³

Faced with these complex philosophical inquiries, judges in the majority of jurisdictions have decided that wrongful life claims by plaintiffs do not state legally cognizable causes of action.

2. *The Minority Viewpoint*

A minority of jurisdictions do recognize a tort action for wrongful life, allowing recovery by the child for the expenses he or she will incur while living with the defects or developmental disabilities.⁴⁴ Currently, four jurisdictions recognize the ability of a disabled child to bring a wrongful life case against a physician or other medical consultant.⁴⁵ California,⁴⁶ New

39. *Id.*

40. *Id.*

41. *Id.* at 925.

42. *Id.* at 929.

43. *Id.* (quoting John R. Brantley, Comment, *Wrongful Birth: The Emerging Status of a New Tort*, ST. MARY'S L.J., 140, 145 (1976)).

44. *Id.*

45. McEntire, *supra* note 10, at 768-69.

46. See *Turpin v. Sortini*, 643 P.2d 954, 966 (Cal. 1982).

Jersey,⁴⁷ and Washington⁴⁸ have allowed disabled children to recover under this theory, and the legislature in Maine has enacted a statute specifically authorizing awards of damages to disabled children who bring wrongful life actions.⁴⁹

The case of *Turpin v. Sortini* involved a California couple who had one child, a daughter named Hope.⁵⁰ When Hope was very young, the parents had her examined by a hearing specialist because they feared that she had been born with a hearing deficiency.⁵¹ The physician who examined Hope assured her parents that her hearing was normal, though, as would later be discovered, Hope was totally deaf.⁵² Soon after, the couple conceived and gave birth to another daughter named Joy. Joy was also born completely deaf.⁵³ A lawsuit was filed on behalf of Joy against the physician who failed to properly diagnose the condition of Hope.⁵⁴ Joy's complaint stated that the doctor had "deprived [her] of the fundamental right of a child to be born as a whole, functional human being without total deafness."⁵⁵ The court noted the error in this allegation.⁵⁶ Joy could never have been born as a whole, functional human being without total deafness.⁵⁷ Instead, according to her own complaint, she would never have been born at all.⁵⁸

Regardless, the court still critiqued other states' decisions to reject wrongful life claims based on sanctity of life arguments.⁵⁹ The court noted that "it is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society."⁶⁰ The court went on to say that they could not agree with other courts (for example, the Illinois Supreme Court in *Siemieniec*) that have stated that *all* life is preferable to non-life.⁶¹ The California Supreme Court suggested that in a case of a child born with a

47. See *Moscatello ex rel. Moscatello v. Univ. of Med. and Dentistry of N. J.*, 776 A.2d 874, 881 (N.J. Super Ct. App. Div. 2001).

48. See *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495 (Wash. 1983).

49. See Maine Health Security Act, ME. STAT. ANN. tit. 24, §2931 (2008).

50. *Turpin*, 643 P.2d at 955.

51. *Id.*

52. *Id.* at 956.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 961.

57. *Id.*

58. *Id.*

59. *Id.* 961-62.

60. *Id.*

61. *Id.* at 962.

debilitating disease or painful condition, perhaps it would have been better if the baby had not been born at all.⁶² The court concluded by holding that plaintiffs asserting such claims are entitled to awards that will compensate them for the extraordinary expenses associated with their condition.⁶³

The *Moscatello* case is New Jersey's most recent attempt to deal with wrongful life claims by disabled children.⁶⁴ In *Moscatello*, the mother, Lucy, sought genetic testing following three miscarriages.⁶⁵ After being assured by doctors that she suffered from no genetic abnormalities, Lucy became pregnant.⁶⁶ She gave birth to a healthy baby girl.⁶⁷ She became pregnant again and, two years later, delivered a baby boy born with severe physical deformities.⁶⁸ The plaintiff, John Jr., suffers from a rare chromosomal disorder of which there are only six documented cases.⁶⁹ In analyzing the tests performed on Lucy, doctors had determined that she was genetically normal because, while two of her chromosomes were rearranged, she was not missing any chromosomal material, nor did she have extra material.⁷⁰

Lucy and her husband, Joseph, filed a complaint against the doctors who had performed and analyzed the genetic tests.⁷¹ The complaint alleged that the doctors lead the Moscatellos to believe that they would bear genetically normal children based on the testing, and that they had failed to inform them of the potential consequences that Lucy's genetic structure could have on their offspring.⁷² The Moscatellos ended up settling their claim with the doctors, which resulted in an award of approximately \$375,000 to compensate them for emotional injuries they had sustained as a result of their son's birth and the additional costs incurred in raising a child with developmental defects.⁷³

62. *Id.*

63. *Id.* at 965.

64. The New Jersey Supreme Court first addressed the issue in *Procanik by Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984). The *Moscatello* court notes that since that case was decided, New Jersey courts have revisited the issue several times. *See, e.g.,* *Michelman v. Ehrlich*, 709 A.2d 281 (N.J. Super. Ct. App. Div. 1998) and *McKenny v. Jersey City Medical Center* 750 A.2d 189 (N.J. Super. Ct. App. Div. 2000).

65. *Moscatello ex. rel Moscatello v. University of Medicine and Dentistry of New Jersey*, 776 A.2d 874, 876-77 (2001).

66. *Id.* at 877.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

Fourteen years later, the Moscatellos filed a wrongful life claim on behalf of their son.⁷⁴ The main issue in the case was whether the parents' previous claim had extinguished John Jr.'s wrongful life claim.⁷⁵ In deciding this question, the New Jersey court first analyzed past cases, noting that wrongful life and birth claims overlap to an extent.⁷⁶ In such cases, both the parents and the disabled child can recover for expenses incurred during the child's minority, but only the child can recover for those in majority.⁷⁷ The court specifically cited *Procanik by Procanik v. Cillo*,⁷⁸ which was the first New Jersey case to recognize a wrongful life cause of action.⁷⁹ A parent cannot extinguish a child's right to bring a tort action by settlement of related claim.⁸⁰ The court approved awards of damages to disabled children to offset the extraordinary expenses associated with living with their defects, but also cautioned against allowing double recovery by the parents and the disabled child.⁸¹ Accordingly, the court noted that the doctors in the *Moscatello* case were entitled to an offset for a portion of the sum already paid to the parents, if it could be shown that particular amounts had benefitted John Jr. specifically.⁸²

In *Harbeson v. Parke-Davis, Inc.*, the Washington Supreme Court cited *Turpin* to reach its conclusion that "it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care."⁸³ In *Harbeson*, the wife of an Air Force member, Jean, sought medical treatment following a grand mal seizure.⁸⁴ She was diagnosed as an epileptic, and doctors prescribed the medication Dilantin to control her future seizures.⁸⁵ Jean asked if Dilantin would cause birth defects if she became pregnant, and her doctors informed her that the medicine could cause temporary hirsutism⁸⁶ and cleft palate.⁸⁷ Jean subsequently became pregnant

74. *Id.* at 878.

75. *Id.*

76. *Id.* at 879.

77. *Id.*

78. *Procanik by Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984).

79. *Id.*

80. *Id.* at 879.

81. *Id.* at 880.

82. *Id.*

83. *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495 (Wash. 1983) (*citing Turpin v. Sortini*, 643 P.2d 954, 965 (Cal. 1982)).

84. *Id.* at 486.

85. *Id.*

86. Hirsutism is a common condition resulting in excessive growth of hair in women. See MELISSA H. HUNTER, M.D. & PETER J. CAREK, M.D., AMERICAN FAMILY PHYSICIAN, EVALUATION AND TREATMENT OF WOMEN WITH HIRSUTISM (2003), <http://www.aafp.org/afp/20030615/2565.pdf>.

87. *Harbeson*, *supra* note 83, at 486.

with and gave birth to two daughters, Elizabeth and Christine, both of whom suffer from fetal hydantoin syndrome (“FHS”).⁸⁸ The court held that Elizabeth and Christine could each bring wrongful life claims to recover the expenses they will incur in living with FHS.⁸⁹ The court found it inconsistent to refuse to allow recovery by disabled children in these types of situations because “the child’s need for medical care and other special costs attributable to his defect will not miraculously disappear when the child attains his majority.”⁹⁰ According to the court, rejecting wrongful life actions placed the burden of bearing those extra costs on the parents or the state.⁹¹ The court disapproved of that approach and said that the doctors or medical consultants whose negligence had created the situation should bear the costs.⁹²

C. Wrongful Pregnancy/Conception Claims

Courts are much more willing to impose liability on the medical community when asked to award damages in wrongful pregnancy actions.⁹³ These causes of action have been brought against physicians who have negligently performed sterilization procedures or abortions and have been used to recover damages from companies who manufacture defective contraception products.⁹⁴ Jurisdictions are divided, however, on the most effective way to deal with wrongful pregnancy claims.⁹⁵ There are currently four approaches used by courts in dealing with these claims.⁹⁶

88. *Harbeson*, 656 P.2d at 486.; Fetal hydantoin syndrome (“FHS”) is a disease caused by fetal exposure to medication (for example, Dilantin). FHS can cause mild mental retardation and other developmental defects and also causes abnormalities of facial features and limbs. See THOMAZ RAFAEL GOLLOP & IVAN SALZO, GENETICS AND MOLECULAR BIOLOGY, A CASE OF PRENATAL DIAGNOSIS OF FETAL HYDANTOIN SYNDROME BY ULTRASOUND (1999), <http://www.scielo.br/pdf/gmb/v22n2/0273.pdf>.

89. *Harbeson*, 656 P.2d at 495.

90. *Id.*

91. *Id.*

92. *Id.*

93. See Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 151 (2005). Some jurisdictions classify these claims as wrongful pregnancy claims. Other jurisdictions call them wrongful conception claims. The terms refer to the same cause of action (medical negligence resulting in the birth of a healthy child).

94. *Id.*

95. McEntire, *supra* note 10, at 767-68.

96. *Id.*

1. *No Recovery Rule*

Currently, Nevada is the only state that does not recognize a cause of action for wrongful pregnancy.⁹⁷ In *Szekeres by Szekeres v. Robinson*, the Nevada Supreme Court explicitly rejected the notion of recovery for the tort action of wrongful pregnancy.⁹⁸ The court suggested that recovery would be more appropriate under a breach of contract theory, however.⁹⁹ In the *Szekeres* case, a healthy baby girl, Erica, was born following a negligently performed sterilization procedure.¹⁰⁰ Erica's mother, Phyllis, brought a wrongful pregnancy action to recover damages incurred as a result of the unwanted and unplanned birth of the baby girl.¹⁰¹

The court rejected Phyllis' claim, finding that her alleged damages could not be adequately calculated and thus, could not be awarded.¹⁰² The court noted that even if it were determined that negligence or carelessness (presumably on the part of the doctor who performed the sterilization procedure) lead to the birth of Erica, no damages could be recovered by Erica.¹⁰³ Simply put, the birth of a healthy baby is not a wrong for which tort compensation can be awarded.¹⁰⁴

The Supreme Court of Nevada also dismissed arguments that failure to recognize wrongful pregnancy claims infringed on the right of parents to make intimate familial decisions, recognized by the United States Supreme Court in *Roe v. Wade* and its progeny.¹⁰⁵ According to the Nevada court, finding that the birth of a normal, healthy child is not a compensable wrong was not inconsistent with parents' rights because that finding did not limit parents' choices about whether to have children or whether to terminate a pregnancy during the first trimester.¹⁰⁶

97. *Id.* at 771.

98. *See Szekeres by Szekeres v. Robinson*, 715 P.2d 1076, 1079 (Nev. 1986).

99. *Id.*

100. *Id.* at 1076.

101. *Id.*

102. *Id.* at 1077.

103. *Id.* at 1078.

104. *Id.* at 1079.

105. *Id.* at 1078.

106. *Id.*

2. *The Benefits Rule*

Unlike Nevada, a small group of jurisdictions have endorsed the view that costs and expenses incurred in raising a healthy child born subsequent to some sort of medical negligence are recoverable, but the damage award must be offset by any benefits received from the birth of the child.¹⁰⁷ This approach is followed by courts in Minnesota, Connecticut and Arizona.¹⁰⁸ In *Sherlock v. Stillwater Clinic*, the Minnesota Supreme Court encountered for the first time the question of whether damages could be recovered for the birth of a healthy baby.¹⁰⁹ In that case, Mr. and Mrs. Sherlock sought medical advice from professionals at the Stillwater Clinic regarding alternatives for limiting the size of their family.¹¹⁰ The Sherlocks already had seven children and had decided they did not want any more.¹¹¹ To that end, Mr. Sherlock underwent a vasectomy.¹¹² After the surgery, he was instructed to bring in a semen sample so that his doctor could determine whether it was free of sperm.¹¹³ Mr. Sherlock brought in the sample and was informed by his doctor that the results of the test were negative.¹¹⁴ Mr. and Mrs. Sherlock resumed sexual relations, and several months later, Mrs. Sherlock discovered that she was pregnant with her eighth child.¹¹⁵ After Mrs. Sherlock gave birth to healthy baby boy, she and her husband brought suit against the doctor who had performed the vasectomy, seeking damages for the medical expenses they had incurred incident to the pregnancy, as well as the costs of raising and educating their eighth child.¹¹⁶

In allowing recovery by Mr. and Mrs. Sherlock, the Minnesota Supreme Court seemed to adopt a more practical approach to dealing with the issues presented by the lawsuit.¹¹⁷ While the court acknowledged that children do provide “aid, comfort, and society which will benefit the parents for the

107. *See* Chaffee v. Seslar, 786 N.E.2d 705, 707 (Ind. 2003).

108. *See generally* Univ. of Ariz. Health Sci. Ctr. v. Superior Court, 667 P.2d 1294 (Ariz. 1983); Ochs v. Borrelli, 445 A.2d 883 (Conn. 1982); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977).

109. *Sherlock*, 260 N.W.2d at 174.

110. *Id.* at 171.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 175. “Ethical and religious considerations aside, it must be recognized that such costs [of raising and educating a child through minority] are a direct financial injury to the parents, no different in immediate effect than the medical expenses resulting from the wrongful conception and birth of the child.”

duration of their lives,”¹¹⁸ they “remain[ed] unconvinced that a physician should be held harmless for the economic costs of supporting an unplanned child.”¹¹⁹ The court did express concern that children of parents who had brought wrongful pregnancy actions would realize later that their birth had been unplanned and they had not been wanted by their parents, which would result in emotional suffering.¹²⁰ The court endorsed the conclusion of a California court that had stated such emotional suffering would be no different than that experienced by any child who later discovered “his parents’ ineptitude at birth control.”¹²¹ The court’s opinion also cited changes and trends in ever-evolving American society.¹²² It noted that “[t]he use of various birth control methods by millions of Americans demonstrates an acceptance of the family-planning concept . . . so that today it must be acknowledged that the time-honored command to ‘be fruitful and multiply’ has . . . lost contemporary significance.”¹²³ In an effort to compensate plaintiffs without awarding them a windfall, jurisdictions that adhere to the benefits rule engage in analyses regarding the advantages and disadvantages of the raising the child to determine the appropriate amount of damages.¹²⁴

3. Full Recovery Rule

Still other courts have agreed that parents are entitled to recover damages based on a wrongful pregnancy claim, but have gone one step further and refused to offset the award for any benefits that the birth of the child may have conferred on the parents. This is the approach taken by courts in California, Wisconsin, New Mexico, and Oregon.¹²⁵ In *Lovelace Medical Center v. Mendez*, Maria Mendez underwent a tubal ligation at Lovelace Medical Center to prevent further pregnancy.¹²⁶ Maria’s doctor only ligated one of her fallopian tubes, so sometime after the procedure, she conceived and gave birth to a healthy baby boy named Joseph.¹²⁷ Maria and her husband brought suit

118. *Id.* at 176.

119. *Id.* at 176.

120. *Id.* at 173.

121. *Id.*

122. *Id.* at 175.

123. *Id.*

124. *Id.*

125. See generally *Custodio v. Bauer*, 59 Cal. Rptr. 463 (Cal. App. 1967); *Marciniak v. Lundborg*, 450 N.W.2d 243 (Wis. 1990); *Zehr v. Haugen*, 871 P.2d 1006 (Or. 1994); *Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603 (N.M. 1991).

126. *Lovelace Med. Ctr.*, 805 P.2d at 604.

127. *Id.* at 604-05.

against the medical center, seeking damages for the cost of raising and educating Joseph.¹²⁸

The Supreme Court of New Mexico began its analysis of the Mendezes' claim by noting that there was no question as to whether a tort had occurred.¹²⁹ It was clear that the doctor had negligently performed the sterilization procedure.¹³⁰ The only question, according to the court, was the appropriate amount of damages to be awarded to the Mendezes.¹³¹ The court criticized the trial court for framing the issue incorrectly.¹³² The trial court had concluded that the birth of a healthy baby was not a wrong for which a plaintiff could be compensated under tort law.¹³³ The Supreme Court of New Mexico, however, determined that the proper issue was not whether the baby's birth constituted an injury, but rather the extent of damages available for the harm at issue in the case: "the invasion of the parents' interest in the financial security of their family."¹³⁴

In determining that Mr. and Mrs. Mendez should be compensated for their injury, the court cited the Supreme Court of Wisconsin, who had recently concluded that parents who seek sterilization often do so precisely because they fear the inevitable harm that would befall them if they became pregnant.¹³⁵ The New Mexico Supreme Court agreed that "the love, affection, and emotional support [that parents] are prepared to give do not bring with them the economic means that are also necessary to feed, clothe, educate and otherwise raise the child. That is what this suit is about"¹³⁶

The court went on to hold it inappropriate to offset an award of damages to the Mendezes by determining the value of benefits conferred on them by the birth of their son, Joseph.¹³⁷ Adhering to an "offset rule" would result in courtroom spectacles wherein parents would attempt to prove that their unwanted children provided them with very little or no benefits.¹³⁸ For public policy reasons, the court concluded that damage awards in wrongful pregnancy cases should not be subject to an offset.¹³⁹

128. *Id.* at 605.

129. *Id.* at 609.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 611.

136. *Id.* (citing *Marciniak v. Lundborg*, 450 N.W.2d 243, 246 (Wis. 1990)).

137. *Sherlock*, *supra* note 109, at 613-14.

138. *Id.* at 613.

139. *Id.*

4. *Limited Damages Rule*

Public policy concerns have prompted other states to adopt still another approach to dealing with wrongful pregnancy claims. The majority of jurisdictions follow the benefits rule, which is often times cited as the approach most consistent with the goal of preserving the sanctity of life.¹⁴⁰ In *Cockrum v. Baumgartner*, the Illinois Supreme Court encountered a case factually similar to *Sherlock*.¹⁴¹ Dr. Baumgartner performed a vasectomy on Leon Cockrum. Even though the doctor had informed Leon that a semen test performed after the procedure had shown no live sperm, Leon and his wife Donna subsequently became pregnant and gave birth to a healthy baby.¹⁴² The Cockrum's brought suit against the doctor, seeking damages for the costs they would incur in raising the child to majority.¹⁴³

The Illinois Supreme Court determined that the only way to allow for an award of damages to parents who have asserted a wrongful life claim was to first acknowledge that parenthood and human life are both compensable wrongs.¹⁴⁴ The court refused to accept these conclusions.¹⁴⁵ In fact, it stated “[t]hat a child can be considered an injury offends fundamental values attached to human life.”¹⁴⁶

The court also pointed out that the duty to mitigate precludes an award of damages.¹⁴⁷ Couples who find themselves in the position of the Cockrums have options available to them if the harsh results of pregnancy prove unmanageable: they can terminate the pregnancy or place the child up for adoption.¹⁴⁸ This avoidable-consequences rule provided the court with another reason to deny the Cockrums' request for damages.¹⁴⁹

The majority approach, followed by the *Cockrum* court and referred to as the “limited damages” rule, allows parents of healthy children born after medically negligent sterilization procedures to be compensated for costs associated with pregnancy and delivery of the child.¹⁵⁰ Child-rearing costs, however, are not recoverable.¹⁵¹ While this approach differs from the benefits

140. See, e.g., *Cockrum v. Baumgartner*, 447 N.E.2d 385 (Ill. 1983).

141. Compare *Cockrum*, 447 N.E.2d at 386 with *Sherlock*, *supra* note 109, at 171.

142. *Cockrum*, 447 N.E.2d at 386.

143. *Id.*

144. *Id.* at 389.

145. *Id.*

146. *Id.* at 388.

147. *Id.* at 390-91.

148. *Id.* at 391.

149. *Id.* at 390-91.

150. *Chaffee v. Seslar*, 786 N.E.2d 705, 708 (Ind. 2003).

151. *Id.*

rule, many of the courts employing the approach have supported the use of it by arguing that the benefits of child-rearing far outweigh any monetary damages associated with raising the child.¹⁵²

As evidenced by the case law, wrongful birth, life, and pregnancy claims have been brought by plaintiffs with increasing frequency in the past few decades. Courts in every jurisdiction have struggled to find an appropriate approach to deciding these cases. The result is a jumbled, complex body of case law that lacks consistency and, ultimately, legitimacy. The distinctions made by judges among these cases seem arbitrary, and even more troubling, discriminatory toward disabled persons.

III. ANALYSIS

The complexities of the cases presented above are apparent, and the decisions of the judges, agonizing. While recognizing and respecting the special care that must accompany many of these decisions, it is also readily apparent that the existing case law is riddled with glaring inconsistencies. The contradictions, so entangled with these highly sensitive issues, are serious in that they suggest a lack of respect for disabled persons in our society.

A. Judges Must Abolish The Distinction in Treatment Between Wrongful Life and Wrongful Pregnancy Claims.

While some courts award compensation subject to an offset for benefits conferred by a healthy baby, no courts employ any offset where disabled babies are concerned. Implicit in this distinction is the notion that disabled babies have less to offer society. Tacit approval of this distinction suggests that society values impaired life at least differently, and arguably less, than unimpaired life. And yet, the majority of jurisdictions support their refusal to recognize wrongful life claims brought by disabled children on the premise that *all* life is sacred, and no value can be placed on human life, regardless of whether that life is perfect or less than so. Respect for the value of all life requires that this distinction be eradicated.

152. *See, e.g., id.* at 708-09.

1. The Distinction Between the Treatment of Wrongful Life and Wrongful Pregnancy Claims Cannot Be Supported Because It Ignores the Benefits Disabled Children Bestow on Their Parents.

Wrongful life claims have been brought on behalf of children with varying degrees of disability. While some plaintiffs have suffered from debilitating developmental defects and congenital disorders that require constant and advanced care, others have coped with blindness and cleft palates. This is not to suggest that those who are born without sight or born with a cleft palate will not encounter difficult struggles. However, it is important to note that there are varying degrees of disabilities, and the cases in this area of the law discount the value of individuals suffering from any and all disabilities with these inappropriate distinctions. For example, *Turpin v. Sortini* involved a wrongful life claim by a child who had been born deaf.¹⁵³ To suggest that children who are born deaf offer their parents no love, affection or joy, such that the burdens imposed by their hearing impairment are offset, is both antithetical to the notion that “life is precious” and truly discriminatory to the hearing impaired. Disabled individuals can lead thriving lives, providing those around them with as much joy as those without disabilities. For example, Karen Bailey, president of the Metropolitan Washington Association of the Deaf-Blind, who is both deaf and blind, refuses to let her disabilities prevent her from accomplishing her goals.¹⁵⁴ She has raised five children and is currently completing a PhD in clinical psychology.¹⁵⁵ She is living proof of the National Organization of Parents of Blind Children’s mantra: “We don’t view blindness as a tragedy or as the defining factor in [an individual’s] life; instead, we see it as just one of the [their] many characteristics.”¹⁵⁶

Many opinions deciding wrongful pregnancy claims have discussed the benefits of parenthood as one reason recovery under such actions are not allowed.¹⁵⁷ On this theory, parents should not be allowed to recover for the birth of an unwanted, though healthy, baby because an award of damages

153. *Turpin*, *supra* note 46.

154. Elizabeth Spiers, *A Woman of Many Talents: An Interview with Karen Bailey*, AMERICAN ASSOCIATION OF THE DEAF-BLIND: SPOTLIGHT ON THE DEAF-BLIND COMMUNITY, Mar. 19, 2009, http://www.aadb.org/deaf-blind_community/2009-03_spotlight.html.

155. *Id.*

156. National Federation of the Blind, National Organization of Parents of Blind Children, Information about Vision Loss for Parents and Teachers, http://www.nfb.org/nfb/Parents_and_Teachers.asp?SnID=1820224547 (last visited Apr. 2, 2009).

157. *See, e.g., Hickman v. Myers*, 632 S.W.2d 869, 870 (Tex. Ct. App. 1982).

would essentially be a windfall.¹⁵⁸ The parents would be allowed to recover money damages, while also enjoying the advantages of having and raising the child.¹⁵⁹ The benefits that children bestow on their parents is never cited as a rationale for refusing to award damages in wrongful life claims.

Judges' commitment to such mantras as, "no man is perfect" or "each of us suffers" absent a corresponding commitment to the value of contributions offered by the disabled suggests that judges either don't believe such benefits exist or that they exist, but to a very limited degree. As noted earlier, this plainly contradicts arguments made from the bench that "all life is precious," but it also ignores common experience to the contrary. One need only visit the website of little Juliana Wetmore, and click on the Guest book link to see evidence of the joy and compassion a child with even a severe handicap has brought to those around her.¹⁶⁰ Site visitors describe the happiness they feel as they read updates about Juliana's progress.¹⁶¹ Many express their thankfulness for having had the opportunity to share Juliana's story.¹⁶² Her positive attitude reminds them to appreciate the simple things in life, and be thankful for all the blessings they are fortunate enough to have. Tami Wetmore has expressed her own gratefulness towards Juliana because the little girl has taught her so much and has been a joy to parent. The judges who render decisions in these wrongful life cases seem to forget the positive contributions that the disabled can make in our society. Their opinions are generally devoid of any mention of stories like Juliana's, and this neglect discriminates against the disabled.¹⁶³

158. *Id.* at 871.

159. *Id.*

160. Guest book, Juliana Wetmore: A Lot to Show the World, <http://www.julianawetmore.net> (last visited Apr. 8, 2009).

161. *Id.*

162. *Id.*

163. *But see* *Ellis v. Sherman* 515 A.2d 1327, 1329 (Pa. 1986). "It cannot escape our judicial notice that many diseased and deformed persons live contented lives and make significant social and personal contributions. Were we to recognize the child's claim that it was injured by being denied nonexistence, we would be required to speculate that this child, unlike similarly situated persons, would be unable to derive any significant meaning, pleasure or satisfaction from its life, and therefore, that its *life* is of such minimal benefit as to constitute an injury. Because we have no way of knowing what opportunities will be available to this child or how the child will respond to life in general, we cannot say how the child's pain and suffering will compare to the benefits of its life, and thus, we cannot determine that its life constitute an injury."

2. The Distinction in Treatment Between the Claims Cannot Be Supported By the Philosophical "Excuses" Given By Judges.

In many of these cases, judges explain their hesitancy to recognize a cause of action brought by a parent on behalf of a child because of the law's historical commitment to the preservation of human life.¹⁶⁴ But as noted in Section II, Nevada is the only state that completely bars recovery in a wrongful pregnancy action in tort.¹⁶⁵ Every other state allows at least a minimal damages award to parents for the wrongful pregnancy that has resulted following the negligence of the doctor or other medical professional. It is only with respect to wrongful life claims that the philosophical excuses advanced by judges act as a complete bar to recovery.

In wrongful life, birth and pregnancy cases, judges argue that it is inappropriate for plaintiffs to ask courts to make decisions about the value of life versus non-life or the value of impaired life versus unimpaired life. When these "excuses" are made in the wrongful pregnancy context, the courts still end up awarding damages to the parents, even if those damages are limited to the costs associated with the pregnancy or the actual delivery of the baby. In the wrongful life context, the excuses amount to a refusal to entertain the claim at all.

Judges remark that these complex philosophical inquiries are better left to theologians or philosophers, but they go on to debate them, and, consequently, arrive at the very conclusions they claimed would be inappropriate.¹⁶⁶ After stating that they have no way of determining whether life is preferable to non-life, judges go on to say that they have a strong commitment to the preservation of life, and that life, no matter how burdened, is preferable to non-life. The very judgments judges said they would not, or rather could not make, are being made in all of these cases. The result is skewed in favor of children born without disabilities.

164. See, e.g., *Berman v. Allan*, 404 A.2d 8, 13 (N.J. 1979). The decision in this case was later overruled by the decision in *Procanik v. Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984).

165. See *Szekeres v. Szekeres v. Robinson*, 715 P.2d 1076 (Nev. 1986).

166. See, e.g., *Siemieniec*, *supra* note 7, at 698 (citing *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978)). The court cites the *Becker* case for the proposition that it is not for the courts to decide whether being born with defects is worse than having never been born at all. However, the court goes on to hold "the public policy of this State to protect and to preserve the sanctity of all human life . . . militates against the judgment that an individual life is so wretched that one would have been better off not to exist." *Id.* at 702. The court ends up making the very decision it said it could not make. It decided that life, although burdened, is, in fact, preferable to non-life.

Perhaps this is just an issue of semantics. If these judges truly do feel that courts are inappropriate forums for discussions on these topics, they must decline the invitation to decide these issues. However, their opinions should reflect that decision completely and consistently. The language in these decisions regarding the importance of life should be replaced by language that reflects the real rationale behind disallowing wrongful life claims: it is beyond the experience of judges to decide these issues. Instead, analysis of existing case law leads to the conclusion that judges believe they are fully qualified and capable of deciding these issues because their opinions are riddled with philosophical pronouncements reflecting their own personal beliefs and morals. This hypocrisy undermines the philosophical “value of life” arguments judges use to support the distinction in treatment between wrongful life and wrongful pregnancy claims.

3. The Distinction in Treatment Between the Claims Cannot Be Supported from an Economical Standpoint.

A counter-argument to this call to abolish the distinction in treatment of wrongful life and pregnancy claims is made by those who confront the issues from a purely economical perspective. According to supporters, judges may fail to discuss the benefits that potentially follow the birth of a disabled child simply because of the financial burdens imposed not only on the families of such children, but society as a whole. Many disabled persons are unable to work, and many depend on federal or state programs and assistance in order to survive. However, the distinction in treatment of the claims cannot be supported by these arguments because they ignore the fact that raising a healthy child can be just as financially cumbersome as raising a disabled child.

Though at least one court has categorized the disadvantages of raising a healthy child as “mere monetary burdens,” that classification is not necessarily accurate.¹⁶⁷ The notion that the costs of raising an unplanned child are incidental and insignificant is not supported by the facts. According to the United States Department of Agriculture, the cost of raising a baby born in 2007 to the age of eighteen will exceed \$200,000.¹⁶⁸ This figure does not take into account the cost of college education or many other expenses provided for

167. See *Hickman v. Myers*, 632 S.W.2d 869, 870 (Tex. Ct. App. 1982).

168. U.S. Dept. of Agriculture, News Release, *The Cost to Raise a Child Today: Less for Food, More for Child Care and Education*, <http://www.cnpp.usda.gov/Publications/News-Media/News3-24-08.pdf> (last visited Apr. 6, 2009) [hereinafter *Cost to Raise a Child*]; U.S. DEPT. OF AGRICULTURE, EXPENDITURE ON CHILDREN BY FAMILIES (2007), <http://www.cnpp.usda.gov/Publications/CRC/crc2007.pdf>.

children by their parents.¹⁶⁹ The cost of raising a healthy child who participates in a variety of extra-curricular activities, which require expensive supplies and equipment, is not necessarily any less than the costs associated with raising a disabled child. In fact, it is foreseeable that the expenses associated with the latter could be considerably less. Certain opportunities for membership and enrollment available to healthy children may not be available to disabled persons and thus, disabled persons will not incur such expenses.

The argument that disabled children are a drain on societal resources (and thus, judges who make discriminatory distinctions among wrongful life and wrongful pregnancy claims are justified in doing so) suggests that healthy children are never a financial burden. A healthy child is not synonymous with a productive, contributing member of society. Healthy children may grow up to be unmotivated, refusing to obtain employment. Perhaps some healthy children will seek benefits through welfare, or other federally funded, assistance programs. Are these children any more or less burdensome than developmentally disabled children? These inquiries are counterproductive. Simply put, the births of both healthy and disabled children can create burdens or hardships for their parents, as well as society. To engage in these economic inquiries, however, is to scrutinize the wrong issue entirely.

B. Judges Must Approach These Wrongful Life and Wrongful Pregnancy Claims Using a New Framework.

Because the current approaches employed by courts in dealing with wrongful life and pregnancy claims discriminate against and undermine the positive contributions of the disabled, a new framework must be used by judges asked to decide these cases. As scientific knowledge and medical advancements progress and develop, these claims will be brought with increasing frequency. The benefits of employing a consistent approach to dealing with these claims are numerous. A revised approach to dealing with these claims will not only ensure that *all* life is respected, it would also lend predictability to a highly complex area of law that confronts very personal and emotional issues. The situations faced by parents or children bringing these claims are complicated and distressing, but a clearer approach in analyzing the issues presented will result in fairer system that protects the rights of all parties concerned.

169. Cost to Raise a Child, *supra* note 168.

1. The Focus of The Court's Analysis in Wrongful Life and Wrongful Pregnancy Claims Should Be the Tortfeasor.

Wrongful life and wrongful pregnancy cases have argued that the birth of a child is simply not a legally compensable wrong and thus, damages may not be awarded. However, as noted by the New Mexico Supreme Court in *Lovelace*, courts have been focusing on the wrong issue. The question is not whether the birth of a baby is a harm. The question is whether the doctor or medical professional's acts or omissions constitute negligence resulting in a damages award. A common oversight by judges in wrongful birth, life and pregnancy cases is that the wrongful act at issue is not emphasized as it would be in other tort cases.

Refusing to allow recovery in wrongful life and wrongful pregnancy actions enables the negligent defendant to enjoy a windfall, while the innocent plaintiff remains uncompensated. Instead of focusing on the extent of the doctor's liability for failure to either diagnose a potential birth defect (or the possibility of such a deformity) or failure to properly perform a sterilization procedure, the focus is on the plaintiff for all the wrong reasons. Some wrongful pregnancy cases have analyzed the parents' motivations for seeking sterilization to determine if a damages award is deserved.¹⁷⁰ This seems highly suspicious. Why is the focus on the victim of the alleged wrongful act? Additionally, inquiring into parents' motivations for seeking sterilization invites post hoc explanations that may not comport with the truth. It seems the courts are trying to shirk their responsibility to decide the difficult issues in these cases. It is true that an award of damages against a doctor could be quite costly. In fact, in cases involving children suffering from severe congenital deformities, the expenses associated with supporting the child may seem astronomical because the child will never reach an age comparable to majority, at which point they could become self-sufficient and financially self-supporting. However, judicial reluctance to award a large sum in compensation is not an appropriate rationale for refusing to compensate a plaintiff following the occurrence of a wrong.

170. *See Univ. of Ariz. Health Sciences. Ctr. v. Sup. Ct. in and for the County of Maricopa*, 667 P.2d 1294, 1300 (Ariz. 1983). The court said that best way to determine whether damages to parents for the unplanned birth of a healthy baby are appropriate is to ask parents what their reasons were for seeking the sterilization. The parents' pre-conception reasons are unbiased, which is why the court found them to be appropriate. "For example, where the parent sought sterilization in order to avoid the danger of a genetic defect, the jury could easily find that the uneventful birth of a healthy, non-defective child was a blessing, rather than 'a damage.'" (*citing Hartke v. McKelway*, 707 F.2d 1544 (D.C. Cir. 1983).

Judges have cited the goals of tort law as support for their refusal to award damages in wrongful life and wrongful pregnancy actions dating from the time that the seminal case of *Gleitman v. Cosgrove* was decided in 1967.¹⁷¹ In *Gleitman*, which no longer represents good law, New Jersey rejected wrongful life claims altogether, and, in so doing, noted that “[t]he normal measure of damages in tort actions is compensatory. Damages are measured by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff’s impaired condition as a result of the negligence.”¹⁷² Because the defect or disability suffered by the child bringing the wrongful life claim could not have been avoided even absent the doctor’s negligence (in other words, the doctor did not cause the defect), *Gleitman* refused to recognize a tort action.¹⁷³ The *Gleitman* court, and other courts who have followed its lead, reach decisions on these cases based on only one purpose of tort law: restoration of a plaintiff to his pre-harm state. This ignores other goals of tort law. Another important goal is punishing and deterring tortious conduct.¹⁷⁴ Compensation of victims is also a fundamental purpose of tort law.¹⁷⁵ According to Prosser and Keaton, “[t]he law of torts . . . is concerned with the allocation of losses arising out of human activities . . . of persons living in a common society The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.”¹⁷⁶ In refusing to focus on the conduct of the alleged tortfeasor, and considering only one goal of tort law among many, judges have shortchanged the plaintiffs bringing these claims.

Importantly, courts’ refusals to award damages in these cases undercuts the legitimacy of the law in this area. As noted above, the majority of jurisdictions follow the “limited damages” rule. Even though parents cannot recover for the costs of raising their healthy, albeit unwanted, child to adulthood, they can recover for the costs associated with the pregnancy and the actual birth of the child. This means that majority of courts in the United States award damages for the birth of a healthy baby following negligent sterilization. If no compensable wrong occurred (as these courts argue), why are limited damages allowed at all? Absent some harm by the defendant, the

171. See Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 332 (2004).

172. *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967).

173. *Id.*

174. Pollard, *supra* note 171, at 336 (citing W. PAGE KEETON, ET. AL., PROSSER AND KEATON ON THE LAW OF TORTS, 372 (5th ed. 1984)).

175. *Id.*

176. *Id.*

plaintiff should not be entitled to any award. These cases do not argue that there has been no wrong, however. These cases do not hold that the defendants did not engage in negligent conduct. Instead, the courts skirt those issues, and reject these claims by focusing on the plaintiffs bringing these actions.

The critical inquiry in these cases should be whether the defendant breached a duty to the plaintiff.¹⁷⁷ The focus should be on the duty owed to the plaintiff. This approach comports with traditional tort law analyses.¹⁷⁸ It also simplifies the current and unnecessarily complex ways that courts have approached these claims. By limiting the scope of their analysis to whether a duty was owed and/or breached and if so, the appropriate amount of damages to be awarded, judges are better equipped to serve the compensatory goals of tort law. This new approach will result in adequate compensation of innocent victims who suffer after negligent acts by tortfeasors, which is the appropriate analysis in these cases.

2. A New Approach in Wrongful Life and Wrongful Pregnancy Claims Would Recognize the Practical Realities Surrounding These Claims.

American courts' refusal to recognize a wrongful life claim ignores the practical reasons such claims are brought in the first place. Judges express displeasure at the thought of a parent bringing a claim premised on the idea that it would have been preferable if their son or daughter had never been born. According to many opinions, the potential for emotional anguish when a child later discovers that a wrongful life or wrongful pregnancy action has been brought on his or her behalf is great. However, these arguments miss the mark. The reality is that damages awarded after one of these actions has been brought may be a family's only option for financial support.

These cases are not brought so that parents or children can announce to the world that they wish they had never been born. Plaintiffs are not trying to make a political or social statement about the value of life. These cases are

[N]ot about the worth of special needs children [or about the worth of unwanted children], [they are] about the financial cost of raising a child, and what happens to the child[ren] who [are] unable to pay for [their] own needs once [they] reach the age of majority. If we allow parents to recover for

177. See generally, Anthony Jackson, *Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England*, 17 *LOY. L.A. INT'L. & COMP. L. REV.* 535 (1995).

178. *Id.* at 544.

negligent genetic counseling [through wrongful life claims], it may make pragmatic sense that the child's claim also be allowed.¹⁷⁹

These cases are simply about the compensation of innocent plaintiffs for the wrongs of negligent defendants. If courts employed the new approach discussed above and focused on the defendant's duty to the plaintiff, judges would never have to ask whether life is preferable to non-life. The current framework requires analysis of these unnecessary questions. When judges limit recovery based on only one of the purported goals of tort law (the ability of the damages award to place the plaintiff in the position he would have been in absent the defendant's negligence), they are forced to consider abstract and theoretical arguments about the value of life. By employing a more practical approach that focuses on the elements of a tort action (duty, breach of duty, causation and damages), judges can simplify this area of law, while also compensating innocent plaintiffs.

IV. CONCLUSION

These cases present troubling issues that no one, be they judges, philosophers, or theologians, can easily answer, but the ethical and moral dilemmas allegedly faced by judges should be left to a more appropriate forum. It is not for individual state courts to debate and decide the benefits of existence verses non-existence. Plato, Socrates and Aristotle are among those more fit for the task. The judicial opinions written in this area should simply address the tort action being brought without endorsing any philosophical or political view.

Juliana Wetmore's story is one of hope, but it is also one that speaks volumes about the effectiveness of support networks.¹⁸⁰ Because Juliana's father, Thom, is an instructor/flight engineer in the Navy, Juliana's medical care is paid for by the Navy.¹⁸¹ When the travel expenses associated with Juliana's surgeries proved to be financially draining on the family resources, Navy friends of Thom Wetmore arranged for air transportation through Angel Flight, Inc., a group of pilots who offer free flights to families.¹⁸² The loving support and assistance of friends and family have allowed Juliana Wetmore to thrive and progress since her birth in March 2003. Other families faced with

179. *Hester v. Dwivedi*, 733 N.E.2d 1161, 1168 (Ohio 2000) (Pfeifer, J., dissenting).

180. *See generally*, William H. McMichael, *Army Times*, *Sometimes Beauty Has an Uncommon Face* (Jan. 10, 2005), available at <http://www.armytimes.com/legacy/new/0-ARMYPAPER -575977.php> (last visited Apr. 4, 2009).

181. *Id.*

182. *Id.*

situations similar to the Wetmore's can attain the critical support necessary through damages awarded pursuant to a wrongful birth or pregnancy action. The reality is that raising a child is expensive and can present a financial burden to parents, whether the child is healthy or disabled. Children, among the most vulnerable in society, deserve the advantages that would flow from a consistent approach to dealing with these claims. To truly respect the value of all life, the focus of these cases should be on whether a physician or medical professional acted negligently and, if so, the amount of compensation to be awarded as a result of that negligence. Deciding wrongful life and pregnancy actions based on that approach eliminates discrimination of disabled persons, appropriately compensates innocent plaintiffs for the harms they have suffered, and lends legitimacy to an area of law currently plagued by glaring inconsistencies.